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Supreme Court, U.S.
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NO. _____

In The

Supreme Court of the United States

October Term, 1997

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ERNEST MCDUFFIE,III,dba,
D & M Contracting Company

Petitioner,

v.

FIRST UNION NATIONAL BANK,

Respondent.

◆

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

◆

PETITION FOR WRIT OF CERTIORARI

◆

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QUESTION PRESENTED

Whether or not a recipeint of Federal funds can use Federal funds to subsidize racial discrimination, under Public Law 88-352, Title VI of the Civil Rights Act, 1964 as amended, 42 U. S. C. 2000, by intentionally treating a Black African-American, SBA (8) a certified general contractor and his or her Black African-American subcontractors differently in the administration of construction and professional contracts?

LIST OF PARTIES

The Petitioner is Ernest McDuffie, III, doing business as D & M Contracting Company, a sole proprietorship, located in Jacksonville Florida, and is not a subsidiary of any other corporation.

The Respondent is First Union National Bank of Florida.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Ernest McDuffie, III, 'pro se' respectfully requests that a writ of certiorari is issued to review this order by the United States Court of Appeals for the Eleventh Circuit issued September 19, 1997.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reprinted in the Appendix commencing at page 1.

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JURISDICTION

Jurisdiction before the District Court existed under 42 U. S. C. 2000d-1. On February 4, 1997, the District Court entered summary judgment. On February 28, 1997, the Petitioner filed a notice of appeal from the judgment. Appellate jurisdiction existed below under 28 U. S. C. 1291.

On September 19, 1997, the Court of Appeals for the Eleventh Circuit issued its order under Title VII, and affirmed the District Court's Title VI judgment. On November 5, 1997, the Court of Appeals modified the order to read Title VI, 42 U. S. C. 2000e from a Title VII case to a Title VI, reaffirming the District Court's judgment.

On October 22, 1997, Petitioner filed a timely petition for rehearing. The petition for rehearing was denied on November 25, 1997. Appendix page 6.

Jurisdiction of this Court exists under, Public Law 88-352, Title VI of the 1964, as amended and 28 U. S. C. 1254.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part:

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Public Law 88 - 352 Title VI of the Civil Rights Act of 1964, as amended, in relevant part:

Section 601

"No person in the United States shall, on the ground of race, color, or National

origin, be excluded from participation in, be denied the benefits, of or be subjected to discrimination under any program or activity receiving Federal assistance."

42 U. S. C. 2000d-4a, provides in relevant part:

"that a "program or activity" (or just a "program") includes "all the operations of" any one of a number of entities, subject only to the provso that at least one (or, as the statute provides, "any") "part of" that entity's operations "is extended Federal financial assistance."

United States Code Executive Order 12250 of November 2, 1980, 1-2. Coordination of Nondiscrimination Provisions, provides in relevant part:

Executive Order 12250 1-201(a) (d)

1-201. The Attorney General shall coordinate the implementation and enforcement by Executive agencies of various nondiscrimination provisions of the following laws:

(a) Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d),

(d) Any other provision of Federal statutory law which provides, in whole or in part, that no person in the United States shall, on the ground of race, color, national origin, handicap, religion, or sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal assis-

tance.

Code of Federal Regulation, 12 CFR Part 25.4 (b) (2), provides in relevant part:

12 CFR Part 25.4(b)(2),

"Each CRA statement shall include at least the following, " a list of specific types of credit within certain categories, such as residential loans for one to four dwelling units, residential loans for five dwellings units and over, housing rehabilitation loans, home improvement loans, small business loans, farm loans, community development loans, commercial loans, and consumer loans, that the bank is prepared to extend within the local community."

Code of Federal Regulation 13 CFR Part 112.2 (b), provides in relevant part:

13 CFR Part 112.2(b)

"The term Federal financial assistance includes:
(1) Grants and loans of Federal funds;
(2) the grant or donation of Federal property and interest in property; (3) the detail of Federal personnel; (4) the sale and lease of, and the permission to use (on other than a casual or transient basis, Federal property or any interest in such property without consideration, or at a nominal consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to the

recipient; and (5) any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance."

Code of Federal Regulation 13 CFR Part 112.2(d), provides in relevant part:

13 CFR Part 112.2(d)

"The terms applicant and recipient mean, respectively, one who applies for and one who receives any of the financial assistance under any of the statutes referred to in paragraph (a) of this section, the term recipient also shall be deemed to include subrecipients of SBA financial assistance, i.e., concerns which secondarily receive financial assistance from the primary recipients of such financial assistance."

Code of Federal Regulation, 15 CFR Part 8.4 (1)(b), provides in relevant part:

15 CFR Part 8.4(1)(b)(v)(vii)

A recipient of Federal financial assistance, or other party subject to this part under any program to which this part applies, shall not participate directly or through contractual or other arrangements, in any act or course of conduct which, on the ground of race, color, or national origin:

(v) Treats a person differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership, or other requirement or condition which

persons that meet in order to be provided any service, financial aid, or other benefit provided under the program.

(vii) Denies a person the same opportunity or consideration given others to be selected as a contractor, subcontractor, or subgrantee when a program is applicable hereto.

Code of Federal Regulation, 24 CFR Part 1.4(2)(I), provides in relevant part:

24 CFR Part 1.4(2)(I)

"A recipient, in determining the types of . . . services, financial aid, or other benefits which will be provided under any such program or activity, or the class of persons to whom, or the situations in which, such . . . services, financial aid, or other benefits will be provided under any such program or activity, or the class of persons to be afforded an opportunity to participate in any such program or activity, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting persons to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program or activity as respect to persons of a particular race, color, or national origin."

Code of Federal Regulation, 24 CFR Part 570-601 (a), provides in relevant part:

24 CFR Part 570- 601 (a)

"A recipient may not, treat an individual differently from others in determining whether the individual satisfies any admission, enrollment, eligibility, membership, or other requirement or condition which the individual must meet in order to be provided any facilities, services or other benefit provided under the program or activity."

Code of Federal Regulation 24 CFR Part 570.602(v), provides in relevant part:

24 CFR Part 570.602(v)

"A recipient may not, treat an individual differently from others in determining whether the individual satisfies any admission, enrollment, eligibility, membership, or other requirement or condition which the individual must meet in order to be provided any facilities, services or other benefit provided under the program or activity."

Code of Federal Regulation 29 CFR Part 31.3(2), provides in relevant part:

29 CFR Part 31.3(2)

"A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under such program, or the class of individuals to whom, or the situations in which, such services, finan-

cial aid, other benefits, or facilities will be provided under any such program or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjection individuals to discrimination because of race, color or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin."

Code of Federal Regulation 34 CFR Part 100.3(b), provides in relevant part:

34 CFR Part 100.3(b)

"Specific discriminatory actions prohibited.
(1) A recipient under any program to which this part applies may not, directly or through contractual or other arrangements, on ground of race, color, or national origin::"

Code of Federal Regulation, 34 CFR Part 106.2(h), provides in relevant part:

34 CFR Part 106.2(h)

"Recipient means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and

which operates an education program or activity which receive or benefits from such assistance, including any submit, successor, assignee, or transferee thereof."

Code of Federal Regulation, 49 CFR Part21.5(v) provides in relevant part:

49 CFR Part21.5(v)

A recipient may not, "treat a person differently from others in determining whether the individual satisfies any admission, enrollment, eligibility, membership, or other requirement or condition which the individual must meet in order to be provided any facilities, services or other benefit provided under the program or activity."

Code of Federal Regulation, 49 CFR Part 23.5(i), provides in relevant part:

49 CFR Part 23.5(i)

"Minority means a person who is a citizen or lawful permanent resident of the United States and who is:

(a) Black (a person having origins in any of the black racial groups of Africa . . .);

(f) Members of other groups, or individuals, found to be economically and socially disadvantaged by the Small Business Administration section 8(a) of the Small Business Act, as amended (15 U. S. 63(a)."

Rule 56 of Federal Rules of Civil Procedure, provides in relevant part:

Rule 56(e) of Federal Rules of Civil Procedure

(e) Form of Affidavits; Further Testimony; . . . Supporting and opposing affidavits shall be made on personal, knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

Florida Statute 481.122.5, provides in relevant part:

Florida Statute 481.122.5

Plans, drawings, specifications and other related documents prepared by a registered architect as part of his architectural practice shall be of a sufficiently high standard to assure the users thereof against misunderstanding of the requirement intended to be illustrated or described by them. To be of the required standard, such documents should clearly and accurately indicate the design of the structural elements and of all other essential parts of the work to which they refer.

Ordinance Code City of Jacksonville, Florida Chapter 126, Part 401 and 404, provides in relevant part:

City Ordinance Chapter 126, Part 401

126.401 Policy of city. It is hereby declared to be the policy of the city to assure equal oppor-

tunities to every person, regardless of race, religion, sex, color, age, handicap, or national origin, in securing or holding employment in a field of work or labor for which the person is qualified.. It is also the policy for the city that persons doing business with the city shall recognize and comply with this policy and will not expend public funds in a manner as will encourage, perpetuate or foster discrimination.

Ordinance Code City of Jacksonville, Florida Chapter 126, Part 404(a), provides in relevant part:

Chapter 126, Part 404)a)

126.404 Nondiscrimination provisions in all city contracts. All city contracts shall contain the following provisions:

(a) The contractor represents that he has adopted and will maintain a policy of nondiscrimination as defined by ordinance throughout the term of this contract.

Executive Order No. 87-104, City of Jacksonville, provides in relevant part:

Executive Order No. 87-104

4.1 Compliance with State and Other Laws

The Bank shall comply with any and all applicable federal, state and local laws, rules and regulations...,

5.1 Non-discrimination provisions

The Bank warrants that it has adopted and will maintain a policy of nondiscrimination as defined by Chapter 126, Part 4, Ordinance Code of the City throughout the term of this Agreement.

STATEMENT OF THE CASE

This litigation was commenced under Title VI of the Civil Rights Act of 1964, as amended in December 1995, with the amended complaint filed January 1996, as a challenge to uphold the nondiscrimination provisions of Public Law 88-352 Title VI of the Civil Rights Act of 1964, as amended, that "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

In June 1996, Petitioner motioned the District Court for an order compelling discovery. August 1996, Respondent filed their motion for summary judgment. February 4, 1997, summary judgment was granted, and on February 28, 1997, the Petitioner filed a notice of appeal from the judgment. March 4, 1997, the District Court denied Petitioner's motion to enter second amended complaint. On September 19, 1997, the Court of Appeals for the Eleventh Circuit issued its order under Title VII, and affirmed the District Court's Title VI judgment. On November 5, 1997, the Court of Appeals modified the order to read the reference to "Title VII, 42 U.S.C. 2000d" is hereby modified to read: Title VI, 42 U. S. C. 2000e, reaffirming the District Courts judgment.
On November 25, 1997 the Appeals Court denied Petitioner's motion for a stay of the issuance of the mandate pending petition for writ of certiorari.

Petitioner, an 8(a) contractor certified under the United States Small Business Administration program

and a wholly owned, minority contracting company. The Respondent, serves as a fund depository for the City of Jacksonville, Florida.[1] The bank and the city receives Federal funds for one or more of the following programs or activities; Community Development, Low to Moderate Income housing and Small Business Administration loans.[2]

Pursuant to a commitment letter dated May 25, 1990, the First Union agreed to loan St. Andrew Andrew Missionary Baptist Church $357,000.00 for the construction of a new facility. Meanwhile, St. Andrew submitted plans dated 4-1-89 to D&M Contracting Company,(a small SBA(8)a minority[3] owner firm), for pricing and bidding the job. Around July 9, 1990, D&M, submitted a proposal in the amount of $350,000 for the church's construction, At the request of the Bank's Real Estate Officer

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[1] Master Agreement for General Banking Services Between The City of Jacksonville and First Union National Bank of Florida, entered into January 1991, by Mayor Thomas L. Hazouri under the Authority of Executive Order No. 87-104.

[2] "Receipts via ACH are primarily represented by monthly distributions of three categories of State Revenue Sharing, three categories of HUD Section 8, Community Development Block Grant drawdowns and distributions from various miscellaneous federal grants." Master Agreement for General Banking Services Between The City of Jacksonville and First Union National Bank of Florida: XVIII..E., page 25-26.

[3] "Minority means a person who is a citizen or lawful permanent resident of the United States and who is: (a) Black (a person having origins in any of the black racial groups of Africa . . .); (f) Members of other groups, or individuals, found to be economically and socially disadvantaged by the Small Business Administration section 8(a) of the Small Business Act, as amended (15 U. S. 63(a)." 49 CFR Part 23.5(i)(f).

(7/12/90) Chris Raisner, the contract price was increased to $432,316 to add parking which would increase the property's value.

In August 1990, a contract was signed between St. Andrew and D & M Contracting Company, after prior approval of the Contractor by the Bank, a condition stated in the Commitment Letter.[4] Upon the approval by the Bank, payment and performance bonds were submitted, which was also a condition of the Commitment Letter.[5] Shortly thereafter, D&M, did a plan walk through with the City's building permitting authority, however substantial omissions[6] on the plans were identified, which were brought to the attention of the architect Steve Lazar; the Banks' Community Development[7] Loan Officer, Ramon L. Day and the borrower St. Andrew. D&M, was

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[4] "Contractor: The contractor to be used to complete the improvements shall be subject to the approval of the Bank, prior to closing of the loan." Commitment Letter, May 25, 1990, Ramon L. Day, Regional Director of Community Development Lending.

[5] "Performance and Payment Bonds: The construction contract shall be covered by a "dual obligee" performance bond and a "dual obligee" labor and material payment bond in amounts sufficient to cover the costs of the improvement. Bank approval of the surety of the bonds is required."

[6] "Plans, drawings, specifications and other related documents prepared by a registered architect as part of his architectural practice shall be of a sufficiently high standard to assure the users thereof against misunderstanding of the requirement intended to be illustrated or described by them. To be of the required standard, such documents should clearly and accurately indicate the design of the structural elements and of all other essential parts of the work to which they refer. Florida Statute 481.122.5

informed by the Bank that as long as the building is constructed according to the City's Building Codes and St. Andrew agreed there is no problem. On September 12, 1990, D&M signed an agreement with the Bank, to continue performance of the construction contract on behalf of the Bank, in the event of borrowers' default. Around October 1990, a second set of plans dated 8/12/90 (amended plans) surfaced. The amended plans had not been approved by St. Andrew nor the Bank, as required by the construction loan agreement Commitment Letter,[8] regarding plans and specifications. On October 18, 1990, the building permit was issued, to the architect.

On several occasions, the Bank withheld funds requested by D&M, containing payments for Black subcontractors. Using the 8/28/90 plans as a basis for withholding. However, payments for the White subcontractors were paid. In addition to delaying disbursements, the Bank contacted D&M's Surety, Hartford after receiving a letter from Wayne C. Kelly of M. V. Cummings Engineers, Inc., an engineering consultant, for the Bank, advising Hartford, D&M had deviated from approved plans and specifications and that the electrical system installed was unsafe, an allegation

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[7] Community Development Loan Officer responsible for assuring Bank is reinvesting in the local community, under the Community Reinvestment Act (CRA). 12 CFR Part 25.4(b)(2)

[8] "Plans and Specifications: .. the Borrower agrees that no change will be made in the plans and specifications without prior consent of the Bank." Commitment Letter 5/25/90.

later proven false by independent engineer, David J. Ross of Winter Park, Florida.[9] As a result of the Bank's withholding disbursements of the construction progress payments, wrongful default, contacting the Surety, and other interference with construction contract, D&M an 8(a) approved contractor, secured a Small Business Administration loan, through Barnett Bank of Florida, with the approval of the SBA Program Manager to be used for the completion of the St. Andrew Project.

The project was scheduled to began August 28, 1990 with completion within 248 calendar days; a completion date of May 23, 1991. The building was dedicated and put in use November 17, 1991, prior to the Bank's release of $91,828 that was to represent the final payment on the St. Andrew contract to the Surety. On December 2, 1991, Hartford's representative Edwin G. Clovin, wrote employee Vice President John G. Munger, asking for clarification on the disbursed amount stating that "there would still be $8,811.40 under contract." After exhausting all avenues to resolve the issue through administrative procedures,[10] D & M Contracting Company filed a claim.

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[9] "The engineer, came out and literally criticized and said each one of these things were wrong and not right. In his letter of July the 6th, I find every one of those items, and I believe there is seven of them there, they are not a code violation. There is a reason for every one of them and they still comply with code. David J. Ross Disposition taken August 29, 1996, page 21, lines 4-8.

[10] Administrative Process: Written complaint filed with Mayor Ed. Austin,, City of Jacksonville, Florida, 11/22/91; John H. Atkinson - Office of Comptroller of the Currency, 12/15/91, 1/28/92; Charles E. Bennett House of Representatives Congress of the US, 2/24/92; U.S. Department HUD, 3/3/94; US Department of Justice, 11/8/93.

The question regarding federal funds was raised in amended complaint filed January 8, 1996, with the U. S. District Court Middle District of Florida, Jacksonville Division, and in the Appellant's Brief filed May 1, 1997, with the U. S. Court of Appeals.

Federal jurisdiction in the United States court of Appeals for the Eleventh Circuit. Jurisdiction is specifically conferred on the Court of Appeals by 28 U. S. C. 1291, Public Law 88-352, Title VI of the 1964, as amended: District court by 42 U. S. C. 2000d.

REASONS FOR GRANTING THE PETITION

America was built by hardworking individuals and small family owned businesses attempting to reach the American dream. The drafters of the United States Constitution wanted to ensure that equity, fairness, and impartiality would be a part of American life ("We the people of the United States, in order to form a more perfect union, establish Justice"...),"[11] thereby guaranteeing all citizens an opportunity to life liberty and the pursuit of happiness.

The success of any firm, small or large depends on good banking relationships. Banks that have reached the status of National, often forget or fail to acknowledge that they are recipients of federal financial assistance.[12] Banks overlook how federal

[11] Preamble to the Constitution of the United States of America

[12] "The term financial assistance includes: (1) Grants and loans of Federal funds; (2) the grant or donation of Federal property and interest in property; (3) any Federal agreement, arrangement,

funds are administrated in their organizations, lack sensitivity to the needs of small and minority business concerns, and as a result, underestimate the far reaching impact of their noncompliance to nondiscrimination laws and provisions.

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH THE U.S. SUPREME COURTS' OPINION IN CELOTEX AND RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Petitioner submitted affidavits pursuant to Rule 56(e), however the Court of Appeals' opinion do not reflect that the affidavits of individuals with first hand personal knowledge were considered.

The Supreme Court in Celotex v. Catrett maintained that Rule 56(e) of Federal Rules of Civil Procedure, did not indicate that evidence must be structured for trial, "we do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Obviously, Rule 56 does not require the nonmoving party to depose her own witnesses. Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary material listed in Rule 56(c), except the mere pleadings themselves."[13] [477 US 324][5].

(a) The motion for summary judgment was filed prematurely by Respondent. Petitioner filed his amended complaint January 6, 1996. Seven (7)

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or contract which has as one of its purpose the provision of assistance." 13 CFR Part 112.2(b).

[13] Rule 56(c) of Federal Rules of Civil Procedure, "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, . . . "

months into the action. Respondent filed for summary judgment on August 6, 1996. The Court in Celotex states:

> "The Plaintiff in a District Court cannot claim to have been 'railroad' by a premature motion for summary judgment, where the motion is filed 12 months after the commencement of action . . ." headnotes at 6.

Even if the Appeals and District Courts had used the initial filing date of December 11, 1995, the summary judgment would still be premature because the motion would be eight (8) months into the case. In Celeotex the Court held, "No serious claim can be made that respondent was "railroad" by a premature motion for summary judgment, since the motion was not filed *until one year* (emphasis added) after the action was commenced..." syllabus at 1(c)

(b) Petitioner's witnesses were a part of the record, prior and when the respondent filed its premature motion for summary judgment.
The court in Celotex at [477 US 337], addressed the issue of evidence already a part of the record:
"summary judgment should be denied on the ground that the moving party failed to satisfy its initial burden of production."

In June 1996, the Petitioner revealed his list of forty five (45) witnesses (exhibit 17)[14] as required by the Case Management Report. Justice White, (Celotex) in separate opinions agrees that if required to reveal witness, it should be done, "but he need not

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[14] Exhibits 1 through 35, referenced in this document were a part of the record filled with the District And Appeals Courts, and the Respondent.

also depose his witnesses or obtain their affidavits to defeat a summary judgment motion asserting that he has failed to produce any support for his case." at 477 US 329

II. THE COURT OF APPEAL'S DECISION BRINGS INTO QUESTION A RECIPIENTS' UTILIZATION OF CRITERIA OR METHODS OF ADMINISTRATION THAT HAVE THE EFFECT OF SUBJECTING PERSONS TO DISCRIMINATION.

The Bank intentionally treated D&M different in the administration of the St. Andrew construction contract, thereby violating his civil rights, that are protected under Title VI of the Civil Rights Act, of 1964 as amended, Public Law 88-352, 29 CFR Part 31,.3(2), 15 CFR Part 8.4(1)(b)(v)(vii), 24 CFR Part 570.602(v), 24 CFR Part 1.4, 13 CFR Part 112.2b,d and 34 CFR Part 106.2(h), and 49 CFR Part 23.5(i).

The Supreme Court, in Grove City College v. Bell, held that Title VI's non-discrimination provision only covered the particular program receiving Federal funds, the Civil Rights Restoration Act of 1987 went further to include the entire organization of a Federal funds recipient.[15]

> "Recipient means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education

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[15] Grove City v. Bell, 465 U. S. 555 (1984).

> program or activity which receive or benefits from such assistance, including any submit, successor, assignee, or transferee thereof."[16]

As of 12/31/91, the Bank showed outstanding SBA loans totaling 3.5 million and in 1993, SBA outstanding loans were 21 million dollars (see exhibit 35, page 122). First Union receives funds from their participation "in the State Housing Initiatives Partnership(SHIP) and Home Programs. Both (according to the Bank) programs use government funds to assist borrowers, (see Exhibit 35, p.124).
First Union National Bank of Florida, also serves as the fund depository for the City of Jacksonville, Florida, (see exhibit 35, pp). 132 - 146), the city receives federal assistance in the form of Community Block Grants and funds from the Housing and Urban Development. The Small Business Administration loan program (CFR 13) and the City of Jacksonville (CFR 15, CFR 24, CFR 29, CFR 49, CFR 34) are recipients of federal financial assistance and are to comply with the Title VI coverage, so must the Bank.

U. S. Code, 42 U. S. C. 2000d-4a, provides that a "program or activity (or just a 'program') includes all the operations of" any one of a number of entities, subject to the proviso that at least or (or, as the statue provides, "any") "part of" that entity's operation is extended Federal financial assistance." The same principle applies in this case, so long as any part of that Bank's "operations" receive federal financial assistance," "all" of that bank's operations" are "programs or activities" and are subject to Title VI. The use of SBA proceeds on the St. Andrew project and the

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[16] 34 CFR Part 106.2(h)

Bank's participation in the SBA program made the Bank a co-recipient.

Title VI case "Hodges by Hodges v. Public Building Commission of Chicago," No. 93 C 4329. U S District Court, N.D. Illinois, Eastern Division, Sept. 14, 1994, where a similar defense of not receiving federal assistance was given, the Court stated:

> **"All of the parties place far too much importance on whether or not the defendants actually receive federal funding. In the post CRA era, whether or not an entity receives federal funds is no longer the sine qua non of a Title VI action. Consistent with the broad definition of "program or activity" courts have rejected such a formalistic approach in favor of examining the defendant's relationship to the entity receiving the federal funds."**

The Bank in their agreement with the City of Jacksonville "warrant" [17] that they had "adopted and would maintain a policy of nondiscrimination, and comply with any and all applicable federal, state and local laws, rules and regulations".[18]

The Bank required a (bid, payment, performance) The Bank required a (bid, payment, performance) bond for St. Andrew, when on similar and higher cost projects built by white contractors no such demand was made. The Bank withheld funds on payment request covering African- American subcontractors even after approval by architect, but paying those for white subcontractors.[19]

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[17] Executive Order No. 87-104, Master Agreement between the City of Jacksonville and First Union National Bank.

[18] Ordinance City of Jacksonville, Fl, Chapter 126,Parts 401, 404(a).

The Bank insisted that amended plans be used to construct the facility, even though not approved.[20] The issuing of wrongful default based on a third party, who later would not stand behind the allegations and disregarding approvals of governmental inspection authorities, even though this agency is the body charged with inspection and approval duties. Further, advocating and recommending St. Andrew to default contractor based on the omissions of others.

"When an owner gives a contractor a set of plans and specifications for constructing a building, there is an implied warranty that the plans and specifications are of good quality and fit for the purpose intended." This theory was supported in Wood-Hopkins Contracting Co. v. Masonry Contractors, Inc., 235 So 2d 548, No.-44, District Court of Appeal of Florida, First District, May 26, 1970. On the other hand, the Luis v Anchorage Asphalt Paving Co., 535 P 2d 11888, No. 2136, Supreme Court of Alaska, May 21, 1975, case gives aid, in that "where the contractor knows about the differences, he/she is obligated to inform the owner of the omission." D & M made the Borrower and the Co-owner (the Bank) aware of the plans. The vast difference in the two sets of plans and the demands from the Bank were unjustified and goes against a standard of architect's care prescribed by Florida Statute 481.221(5).[21]

The electrical subcontractor Nathaniel Richardson,[22] Charles Wilcox,[23] the Heating/Air subcontractor,

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[19] Affidavit of Ernest McDuffie,III, Appendix page 131, at par 3.

[20] Plans and Specifications: Commitment Letter 5/25/90.

[21] "Juhn v. Dept of Professional Regulations, No. AN-305, District Court of Appeal of Florida, Apr. 14, 1983,"

and A. B. Coleman of St. Andrew, certified in their affidavits to the unfair treatment by First Union.[24] The statements of these individuals were a part of the petition sent to the Appeals Court and the plaintiff's second motion to amend (alter) complaint was a part of the record, which the Supreme Court ruled permissible, plaintiff's could amend their pleadings to conform to the evidence under Fed.R.Civ.P, 15(b) even at the appeals stage.[25]

III. THE COURT OF APPEAL'S DECISION CONFLICTS WITH THE OPINION IN TWIN CITY.

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[22] " I had to seek work outside of area." "I have never seen a bank and engineer get so involved," and "I have completed other projects, such as schools, airports, and churches ." "As the only Black state certified electrician in Florida during this time, the way we were treated nearly ran me out of business." Affidavit of Nathaniel Richardson, page 115, at paragraph 5,6.

[23] "It was a bad situation with First Union on St. Andrew. The Church was the one paying for the equipment, but the bank along with the architect and engineer wanted them to have something also. The project gave Mr. McDuffie and his subcontractors in Jacksonville, a bad name making work hard to obtain. As a result Bill Refrigeration had to close its doors, and I found employment elsewhere. Affidavit of Charles Wilcox, page 118, at paragraph 5.

[24] "There seemed to be two standards being applied: one for black contractors and the other for white contractors, on the project." "There were two set or more sets of plans, . . . The motivation behind the letters from the engineer was unfair and suspicions . . . and the bank withheld approved payments." " In my eyes Rob Dunn was First Union... his actions towards us seemed to be negative and discriminatory." Affidavit of A. B. Coleman, page 99-100, paragraphs. 6, 7, 8, 9.

[25] Brown v. Crawford, 906 F.2d 667 (11th Cir.) Footnote 2.

Factors in determining if D & M has standing to bring action against the Bank, rest upon if either the duty owed or the intent to benefit is met. The court in Twin City Construction Company v. ITT Industrial Credit Co., No. C4-84-1113, Court of Appeals of Minnesota, Dec. 11, 1984., states:

> "a construction loan agreement was intended for the benefit of the contractor . . . even though there was the provision that no third party was entitled to rely on any provisions in the agreement."

D & M agreed to construct St. Andrew church. The duty owed[26] by St. Andrew was the obligation to pay for the church. That duty was assumed by the Bank when it committed itself to the construction loan. Having assumed the obligation, it proceeded to discharge the duty owed by St. Andrew by paying D & M some of the progress payments. Thus, the Bank's performance under the contract discharged a duty owed D & M by St. Andrew; the duty-owed test was met.

The intent to benefit test is met if the contract expresses some intent by the parties to benefit the third party through contractual performance. The requirement of the Bank to approve the contractor prior to loan closing, the signing of a Contractor's

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[26] Duty owed: "The duty owed test is met if the promisor's performance under the contract discharges a duty otherwise owed the third party by the promisee. The intent to benefit test is met, if the contract expresses some intent by the parties to benefit the third party through contractual performance.." Twin City Construction Company of Fargo, N.D. v. ITT Industrial Credit Company No. C4-84-113.

agreement that subordinated D & M's interest and the posting of a performance and payment bond made D & M a party to the construction loan with third party beneficiary rights,[27] despite the Bank's third party disclaimer. Additionally, stated under the Bank's Real Estate Loan Continuation Agreement, "the contractor's agreement is a condition to the making of the loan and that the contractor derives a direct economic benefit from the loan being made." (See Exhibit 35, p. 109). The posting of $10,000.00 for the three bonds by D&M and the signing of the Continuation agreement, gave the contractor standing.

In the case Association of Mexican American Educators v. The State of California Commission on Teacher Credentialing. No. C-92-3874 WHO, U.S. District Court, N. D. California, Aug. 25, 1993, the Court states:

> **"Plaintiffs under Title VI of Civil Rights Act, which prohibits use of federal funds to subsidize racial discrimination, may maintain private right of action based on administrative regulations promulgated pursuant to Title VI; Supreme court has held that those regulations are valid and that they further congressional purpose of withholding federal funds from discriminatory practices."**

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[27] "A third party beneficiary is one to whom the promisee owes or is believed to owe a duty which is discharged by the promissor's performance, and the contractual right the third party beneficiary acquires is to enforce a promise made for his benefit which he otherwise would not be able to enforce. Twin City Construction Company of Fargo, N.D. v. ITT Industrial Credit Company No. C4-84-113.

IV. THE COURT OF APPEAL'S DECISION BRINGS INTO QUESTION HOW ADVERSE OF AN IMPACT DOES AGREEMENTS, ARRANGEMENTS OR OTHER SPECIAL CONTRACTS, HAVE ON A GROUP PROTECTED BY TITLE VI.

The final issue to be consider is whether the Bank's actions had a disproportionate adverse effect on a group protected by Title VI. The requiring and then attacking the bonding capability of Black African Americans is a practice that prevent the growth and marketability of small businesses. The Respondent made no bond requirement on similar and higher cost projects built by white contractors. For example, First Timothy Baptist Church ($750,000.00) constructed by John Stokes Company; and Saint Paul African Methodist Episcopal Church ($2,100,000.00) built by Benchmark Companies.[28] Respondent argues that posting a bid, payment, and performance bond is usual in these types of transactions. However, if this is the practice, why was a different criteria or requirement applied for D & M Contracting Company?[29] [30]

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[28] Appellant's Petition for Rehearing, Appendix pp 77-83,130-135

[29] Public Law 88-352, Title VI, of the Civil Rights Act of 1964, as amended: "No person in the United States shall, on the ground of race, color, or National origin, be . . . subjected to discrimination under any program or activity receiving Federal assistance."

[30] 49 CFR Part21.5(v) "A recipient may not, "treat a person differently from others in determining whether the individual satisfies any admission, enrollment, eligibility, membership, or other requirement or condition which the individual must meet in order to be provided any facilities, services or other benefit provided under the program or activity."

The District Court nor the Appeals Court addressed the issue of First Union utilizing, "criteria or methods of administration which have the effect of subjection individuals to discrimination."[31]

The bank holds a pivotal position in the business community and could help to reduce the disparity between 7 Black and 656 white General contractors, in the local community. A bondable general contractor maybe able to employ a large work force, engage innumerable subcontractors who in turn employ a substantial work force within the community. Bondability and bank support are key factors. Over 95 percent of the workforce on the St. Andrew project were African American livings in the local community.

The Bank's history in dealing with minority issues speak to the far reaching effect of the organization's corporate business practices. Discrimination cases filed in Winter Garden, Florida, 1990, protest in Orlando, Florida and Charlotte, the Bank's Corporate Headquarters, are indicative of the lack of sensitivity to Blacks and minorities . Federal law prohibits using federal funds to subsidize discrimination according to Association of Mexican American Educators v. The State of California Commission on Teacher Credentialing. No. C-92-3874 WHO, U.S.,District Court, N. D. California, Aug. 25, 1993, "held that Title VI itself forbade the used of Federal funds, in programs with a discriminatory effect, regardless of the purpose behind the program."

The District Court in its order of February 4, 1997, writes: "it may very well be that Plaintiff was

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[31] 29 CFR Part 31.3 (2).

> mistreated in some respect by the Defendant; however, based on the current record, a reasonable jury could not find that such mistreatment was the result of intentional discrimination based on Plaintiff's race and/or color or that Defendant's actions had a disproportionate impact on African Americans."

The Petitioner's rights of equal protection of the laws and due process, under the Fourteenth Amendment of the Constitution of the United States were violated. Affidavits of African-American directly involved and affected by the "mistreatment" were never considered by the Appeals Court, yet affidavits used by the Defendant were considered as evidence to properly support a premature motion for summary judgment in the District Court. The Appeals Court affirmed the lower court's order. Legal fairness was not applied as one would expect pursuant to the Fourteenth Amendment.

As a national bank,[32] a federal funds recipient, and one of the largest commercial banking institutions in Florida, the bank's obligation to uphold federal laws should be paramount, since the impact of their actions affect not just a city or state but individuals nationwide. First Union

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[32] "Consolidated assets of $72.3 billion, controls eight banks in North Carolina; Georgia; South Carolina; Florida; Virginia; Washington, D.C.; Maryland; and Tennessee. First Union is the second largest commercial banking organization in Florida, with its subsidiary depository institutions controlling , $21.4 billion in deposits, representing approximately 12.3 percent of the total deposits in depository institutions in the state." _Federal Reserve System, Order Approving Application to Acquire and Merge a Savings Association Into a Subsidiary Bank, Board of Governors, July 1, 1994.

control banks in North Carolina, South Carolina, Florida, Virginia, and the District of Colombia, all of which have African American population. Just as the Attorney General is charged with the coordination of various nondiscrimination provisions,[33] the Bank had a similar duty. That duty was to ensure all entities, operations, branches, offices and subsidiaries abide by the nondiscrimination laws, regardless of the location of the branch, office, entity, operation, or subsidiary. The impact of the day to day business practice of utilizing "criteria or methods of administration that have the effect of subjection individuals to discrimination,"[34] is forbidden by Title VI.

◆

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Ernest McDuffie, III, pro se
8803 Yeoman Drive
Jacksonville, Fla 32208
904-765-3149

March 1998

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[33] Executive Order 12250 1-201(a) (d) 1-201. "The Attorney General shall coordinate the implementation and enforcement by Executive agencies of various nondiscrimination provisions of the following laws: (a) Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d),.. (d) Any other provision of Federal statutory law which provides, in whole or in part, that no person in the United States shall, on the ground of race, color, national origin, handicap, religion, or sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal assistance."

[34] 29 CFR Part 31.3 (2).

appendix 1

DO NOT PUBLISH)
September 19, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 97-2263
Non-Argument Calendar

D. C. Docket No. 95-01210-CIV-J-20B

ERNEST McDUFFIE, III,
individually d.b.a.
D & M Contracting Co.,

Plaintiff-Appellant,

versus

FIRST UNION NATIONAL BANK
OF FLORIDA

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

---

(September 19, 1997)

Before HATCHETT, Chief Judge, EDMONSON and CARNES, Circuit Judges.

PER CURIAM:

appendix 2

Ernest McDuffie, III, filed a lawsuit against First Union National Bank alleging violation of Title VII, 42 U. S. C. 2000d. The district court granted summary judgment for First Union, and McDuffie appeals. We agree with the district court that even assuming First Union had receive federal financial assistance with respect to the loan involved in this case and McDuffie has standing to bring this action, First Union is still entitle to summary judgment, because McDuffie has not made out a prima facie case of discrimination.

AFFIRMED.

Ernest McDuffie \P
8803 Yeoman Drive
Jacksonville, Fl 32201-3315

RE: 97-2263McDuffie v. First Union NationalDIST, CT.NO.-95-01210 CIV-J-20B

Other addressees: Richard D. Sletten
Hon. Harvey E. Schlesinger
E. Lanny Russell

appendix 3

September 19, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 97-2263
Non-Argument Calendar

D. C. Docket No. 95-01210-CIV-J-20B

ERNEST McDUFFIE, III,
individually d.b.a.
D & M Contracting Co.,

Plaintiff-Appellant,

versus

FIRST UNION NATIONAL BANK
OF FLORIDA

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

---

Before HATCHETT, Chief Judge, EDMONDSON and CARNES, Circuit Judges.

JUDGMENT

This cause to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was taken under

submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: September 19, 1997'
For the Court: Miguel J. Cortez, Clerk

BY: Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 11/25/97

appendix 5

November 25, 1997

Ernest McDuffie\P
803 Yeoman Drive
Jacksonville, Fl. 32201-3315

RE: 97-2263 McDuffie v. First Union National
DIST.CT.NO -95-01210 CIV-JB

Other addressees: Richard D. Sletten
E. Lanny Russell

appendix 6

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 97-2263

November 25, 1997

ERNEST McDUFFIE, III,

Plaintiff-Appellant,
versus

FIRST UNION NATIONAL BANK
OF FLORIDA

Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Florida

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ORDER:

(✓) The motion of Appellant, ERNEST MCDUFFIE, III, for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of Appellant, ERNEST MCDUFFIE, III, for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme that the certiorari petition has been filed, The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon

expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of Appellant, for a further stay of the issuance of the mandate is granted to and including , under the same conditions as set forth in the preceding paragraph,.

( ) IT is ordered that the motion of appellant, , for a further stay of the issuance of the mandate is denied.

E. Carnes
UNITED STATE CIRCUIT JUDGE

ORD-45

appendix 8

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street,N. W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

November 25, 1997

In Replying Give Number of Case and Names of Parties

Richard D. Sletten
Clerk, U.S. District Court
311 West Monroe, Room 110
Jacksonville, Fl32201

RE: 97-2263 McDuffie v. First Union National
DC DKT No.: 95-01210 CIV-J-20B

The motion for stay of mandate has been denied. The enclosed certified copy of the judgment and a copy of this court's opinion are hereby issued as the mandate of this court.

Also enclosed are the following:

☒ Original Exhibits, consisting of four boxes
☒ Original record on appeal or review, consisting of two volumes.

Please acknowledge receipt on the enclosed copy of this letter.

Sincerely,

THOMAS K. KAHN, Clerk

Reply To: Anne Shadinger 404-331-5440

appendix 9

Encl.

MDT-1 (2/92)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 97-2263
D. C. Docket No. 95-01210-CIV-J-20B

November 5, 1997

ERNEST McDUFFIE, III,

Plaintiff-Appellant,

versus

FIRST UNION NATIONAL BANK
OF FLORIDA

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

---

ON PETITION FOR REHEARING

Before HATCHETT, Chief Judge, EDMONSON and CARNES, Circuit Judges.

PER CURIAM:

In the first sentence of our September 19, 1997 opinion in this case, the reference to "TITLE VII, 42 U. S. C 2000d" is hereby modified to read: "Title VI, 42 U. S. C. 2000e."

In all other respects the petition for a rehearing is DENIED.

November 5, 1997

Ernest McDuffie \P
8803 Yeoman Drive
Jacksonville, Fl 32201-3315

RE: 97-2263McDuffie v. First Union National
DIST, CT.NO.-95-01210 CIV-J-20B

Other addressees: Richard D. Sletten
Hon. Harvey E. Schlesinger
E. Lanny Russell

appendix 11

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street,N. W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

November 5, 1997

In Replying Give Number of Case and
Names of Parties

MEMORANDUM TO COUNSEL OR PARTIES:

RE: 97-2263 McDuffie v. First Union National
DC DKT No.: 95-01210 CIV-J-20B

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rule of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

THOMAS K. KAHN, Clerk
Reply To: Ed McElhenney (404) 331-6147

Encl.

REHG-1(7/87)

appendix 12

United States District Court
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

February 4, 1997

JUDGMENT IN A CIVIL CASE

Ernest McDuffie,III
individually d.b.a.
D & M Contracting Company

v. CASE NUMBER: 95-1210-Civ-J-20B

First Union National Bank OF
FLORIDA.

( ) Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

( ) Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Pursuant to the Court's order entered February 4, 1997, Judgment is hereby entered in favor of Defendant.

February 5, 1997
Date

Richard D. Sletten
Clerk

Counsel notified

(By) /Deputy Clerk

appendix 13

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

ERNEST McDUFFIE, III,
individually d.b.a.
D & M Contracting Co.,
Plaintiff,

v. Case No. 95-1210-Civ-J-20B

FIRST UNION NATIONAL BANK
OF FLORIDA
Defendant.

ORDER

Before the Court are Defendant's Motion for Summary Judgment (Doc. No. 25, filed August 6, 1996), Plaintiff's Motion for an Order Denying Defendant's Motion for Summary Judgment (Doc. No. 40, filed September 16, 1996; "Plaintiff's Response") [1] and Defendant's Motion for Leave to File Response to Plaintiff's Motion for Order Denying Summary Judgment Motion (Doc. No. 42, filed September 25, 1996. Defendant's Motion for Leave to File Response is GRANTED.

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[1] Prior to filing his response, the Plaintiff was sent a copy of this Court's Order describing the summary judgment provisions found in Rule 56 of the Federal Rules of Civil Procedure and warning the Plaintiff about a failure to comply. See Order (Doc. No. 34, filed August 16, 1996).

DONE AND ORDERED at Jacksonville, Florida, this 4th day of February, 1997.

FACTS

Pursuant to a commitment letter dated May 25, 1990, and a Construction Loan Agreement dated September 12, 1990, First Union National Bank ("First Union") agreed to loan St. Andrew Missionary Baptist Church ("St. Andrew") in excess of $4000,000 for the construction of a new church. See Affidavit of Robert H. Dunn (Doc. No. 30, filed August 6, 1996; "Dunn Aff,") at ¶ 4 and Exhibits A, B. According to the Defendant, the loan was a conventional commercial bank loan that was not federally funded and was not made under any program or activity receiving federal financial assistance. Dunn Aff. at ¶ 5; Affidavit of John G. Munger (Doc. No. 31, filed August 6, 1996; "Munger Aff. ") at ¶ 5. Additionally, the Commitment letter expressly states "No person who is not a part to this Commitment shall have or enjoy any rights under this Commitment. Also, all third-party beneficiary rights are expressly negate." Dunn Aff., Exhibit A.

Thereafter, St. Andrew hired, and First Union approved, Plaintiff Ernest K. McDuffie, III ("McDuffie") as the general contractor to construct the building. McDuffie was required by the loan documents to obtain a performance bond to indemnify First Union and St. Andrew in the event McDuffie failed to perform as required in the Contract. Dunn Aff. at ¶ 12. In the event McDuffie failed to perform. First Union had the right to notify the surety --- Hartford insurance Company ("Hartford") of McDuffie's default. See Dun, Aff., Exhibit E.

During construction and on a few occasions, the Defendant delayed disbursing funds requested by the Plaintiff . See Plaintiff's Exhibit 19 (received January 2, 1997) at pp. 104-119. According to the Defendant, it did so because the work for which the funds were requested was not done according to the approved plans and specifications. Dunn Aff. at ¶ 14; Munger Aff. at ¶ 15. First Union ultimately paid the balance of the loan. Munger Aff. at ¶ 17.

In addition to delaying disbursement, First Union contacted Hartford after receiving a letter from Wayne C. Kelly, President of M. V. Cummings Engineers, Inc., an engineering consultant, advising First Union that McDuffie had substantially deviated from approved plans and specifications for the church and that the electrical system installed by McDuffie was unsafe. Dunn Aff., at ¶ 13.

As a result of First Union's delay in the disbursement of the loan proceeds, contacting Hartford, and other actions "interfering with the construction contract," Plaintiff filed this lawsuit on December 11, 1995, claiming that First Union violated Title VI of the Civil Rights Act of 1964, 42 U. S. C. 200d et seq. McDuffie specifically asserts in his response to Defendant's motion that First Union intentionally treated him differently in the administration of the construction contract by 1) requiring three bonds, 2) insisting that the facility be built according to plans and specifications not used in bidding, pricing, or bonding the contract, 3) withholding construction funds even though approved, 4) calling for default based on faulty and misleading information, and 5) disregarding their March 1, 1988 Real Estate Policies and Practice of providing evidence of gov-

ernmental approval and plan comparison. Plaintiff's Response at pp. 29-30.

DISCUSSION

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of." Red. R. Civ. P. 56(c). The moving party bears the initial burden of showing the Court, by reference to materials on file that there are no genuine issues of material fact that should be decided at trial. Clark v. Coats & Clark, Inc., 929 F. 2d 604, 608 (11th Cir. 1991). When a moving party has discharged its burden, the nonmoving party must then "go beyond the pleadings," and by its own affidavits, or by "depositions, answers to interrogatories, and admissions on file," designate specific facts showing that there is a genuine issue for trial. Celotex Corp, v. Catrett, 477 U.S. 317, 324 (1986).

In determining whether the moving party has met its burden of establishing that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law, the Court must draw inferences from the evidence in the light most favorable to the nonmovant, Key West Harbor v. City of Key West, 987 F. 2d 723, 726 (11th Cir. 1993), and resolve all reasonable doubts in that party's favor, Spence v. Zimmerman, 873 F. 2d 256, 257 (11th Cir. 1989).

Thus, if a reasonable fact finder evaluating the evidence could draw more than one inference

from the facts, and if that inference introduces a genuine issue of material fact, then the court should not grant the summary judgment motion. Augusta Iron and Steel Works v. Employers Insurance of

Wausau, 835 F. 2d 855, 856 (11th Cir. 1988). It must be emphasized that the mere existence of some alleged factual dispute will not defeat an otherwise properly supported summary judgment motion. Rather, "the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute about a material fact is "genuine" if the "evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id, at 248. The inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52.

In its Motion, the Defendant make five arguments for summary judgment: 1) Title Vi has no application because First Union received no federal financial assistance; 2) Title Vi has no application because Plaintiff has no standing to bring this action; 3) The statue of limitations has expired,[2] 4) Plaintiff has failed to make a prima facie showing of discrimination; and 5) Tittle BI does not prevent discrimination based on economic or minority business status. Having considered the Defendant's Motion and the Plaintiff's Response, and having read

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[2] The Court finds that the Defendant has not shown that Plaintiff's Complaint is barred by the four year statue of limitations.

the supporting affidavits and filed depositions, the Court concludes that Defendant is entitled to judgment as a matter of law.

The Plaintiff alleges that Defendant discriminated against him because of his race, color, economic status, and minority business status in viola

tion of Title VI of the Civil Rights Act of 1964, 42 U.S. C. 2000d et seq. and 12 Code of Federal Regulations ("CFR") Part 25.7(f), 29 CFR Part 31, 49 CFR Part 21.5, 41 CFR Part 60, and 15 CFR Part 8. See Amended Complaint (Doc. No. 9, filed January 8, 1996). The Court notes that 12 CFR Part 25.f(f) and 41 CFR Part 60 were not promulgated pursuant to Title VI.

Under Title VI, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C 2000d.

As the statute makes clear, and as stated in the case law, Plaintiff must demonstrate that Defendant was a recipeint of federal financial assistance. See Dowdell b. City of Apopka, Fl., 511 F. Supp. 1375 (M. D. Fla. 1981), aff'd, 698 F.2d 1181 (11th Cir. 1982). In Dowdell, the Plaintiffs were able to satisfy this requirement by showing that "the City of Apopka has received federal revenue sharing funds and . . . that these funds have been used to construct or improve municipal services." Id. at 1384. In the present case, two bank officials state that the loan was a conventional commercial bank loan that was not federally funded and was not

made under any program or activity receiving federal financial assistance. Dunn Aff. at ¶ 5; Munger Aff., at ¶ 5. On the other hand, Plaintiff has identified a First Union interoffice memorandum which suggests that "Community Development Lending Consideration" were factored into the decision to make the loan. See Plaintiff's Exhibit 20, pp, 49-51. Standing alone, however, this document is not probative of First Union receiving federal financial

assistance. See, e.g., Steptoe v. Savings of America, 800 F. Supp, 1542, 1548 (N. D. Ohio 1992) ("The mere fact that (Defendant) is bound by certain federal statutes or participates in certain federal programs is insufficient to give plaintiffs standing to bring a claim under 42 U. S. C. 2000d."). Plaintiff's remaining arguments on this issue are likewise unpersuasive. Accordingly, the Court concludes that Plaintiff has not shown there to be a genuine issue as to whether First Union received federal financial assistance, and therefore Title VI is inapplicable.

Even had the bank been provided federal funds so that Title VI is applicable, the Court is not convinced that Plaintiff has standing. To bring an action under Title VI, a plaintiff must demonstrate that he was "the intended beneficiary of, an applicant for, or a participant in a federally funded program." Doe on Behalf of Doe v. St. Joseph's Hospital, 788 F.2d 411, 418-19 (7th Cir. 1986). St. Andrew, and not Plaintiff, was the applicant for and the intended beneficiary of the First Union loan. See Dunn Aff., Exhibit A. Further, based on Vakhara v. Swedish Covenant Hospital, 824 F. Supp, 769 (N. D. Ill, 1993), this Court concludes that, in the context of this case, a "participant" in the federally funded program must be the borrower of the

funds. To hold otherwise would be to swing open the doors of the Courthouse and invite lawsuits that Congress never intended.

Even assuming that Defendant received federal financial assistance with respect to the loan and that Plaintiff may properly bring this action, Defendant must still be granted summary judgment, as Plaintiff has not made a prima facie case of discrimination. Title VI bars only intentional discrimination. Elston v. Talladega County Board of Education., 997 F. 2d 1394, 1406 (11th Cir. 1993). However, when regulations are promulgated pursuant to Title VI, they "may validly proscribe actions having a disparate impact on groups protected by the statute, even if those actions are not intentionally discriminatory." Id. (citation omitted). The regulations cited by the Plaintiff appear to proscribe actions "having a disparate impact on groups protected by the statue." See 15 CFR Part 8, Subpart A, sec, 8.4 (b) (2) - (3) and compare with Elston, 997 F. 2d at 1407 n. 12 (quoting relevant Department of Education Title VI regulations for purpose of disparate impact standard.

As stated in Elston, "[t]o establish liability under the Title VI regulations disparate impact scheme a plaintiff must . . . demonstrate by a preponderance of the evidence that a facially neutral practice has a disproportionate adverse effect on a group protected by Title VI." 997 F.2d at 1407. This the Plaintiff has not done. Plaintiff has merely repeated throughout this pleading that Defendant discriminated against him in violation of his race and color. These conclusory allegations are insuffi-

cient to defeat Defendant's properly supported motion for summary judgment. See, e. g., Elliottt v. Group Medical & Surgical Service, 714 F. 2d 556, 564 (5th Cir. 1983), cert, denied, 467 U. S. 1215 (1984). The Court recognizes that Plaintiff has filed with Court a large number of documents concerning his lawsuit; however, he has not identified one document showing that the Defendant's actions had disproportionate effect[3] on African Americans or that race played any role whatsoever in Defendant's actions

vis-à-vis the construction of St. Andrew Church. Nor has the Court found any such evidence after conducting an independent review of the record."[4]

Further, Title VI provides relief only from discrimination based on race, color, or national origin; discrimination against Plaintiff's minority business status and economic status cannot be the basis for an action under Title VI, even had Plaintiff

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[3] Regardless of the legal standard applied by the Court, judgment must be entered in favor of Defendant: Plaint had not brought forth any direct or circumstantial evidence of intentional discrimination on the basis of his race and/or color.

[4] The Court notes that the discovery deadline has passed, see Case Management Report (Doc, No. 14, filed February 20, 1996) at pp. 5, 7, and that Plaintiff is aware that the discovery deadline has passed.. See Deposition Transcript of Ernest K. McDuffie, III (Doc. No. 29, filed August 6, 1996) at p. 209. Although the Plaintiff may believe that there are relevant documents in Defendant's possession that will evidence a "pattern of discriminate," id at pp. 204, 209-10, the Court's Cast Management and Scheduling Order clearly states that "All requests and motions pertaining to discovery shall be filed so that the discovery desired will be due prior to the completion date and any disputes which require [] Court intervention shall be made by proper motion immediately." Case Management and Scheduling Order (Doc. No. 15, filed February 27, 1996), at p. 1. The Plaintiff has never filed such a motion.

brought forth evidence of such discrimination. See 42 U. S.C. 2000d; grimes by and through Grimes v. School, 832 F. Supp, 704, 711 (S.D.N.Y. 1993) (" Title VI is restricted to race, color, and national origin discrimination."), aff'd 37 F. 3d 857 (2d Cir. 1994). It may very well be that Plaintiff was mistreated in some respect by the Defendant; however, based on the current record, a reasonable jury could not find that such mistreatment was the result of intentional discrimination based Plaintiff's race and/or color or that Defendant's actions had a disproportionate impact on African Americans.

Accordingly, Defendant's Motion for Summary Judgment GRANTED. The Clerk shall enter judgment in favor of Defendant and shall close the file.

DONE AND ORDERED at Jacksonville, Florida, this 4th day of February, 1997.

Harvey E. Schesinger
United States District Judge

Copies to:
Ernest McDuffie, III
Michael Freeed, Esq.
Garry Randolph
Law Clerk

appendix 23

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

March 4, 1997

ERNEST McDUFFIE, III,
individually d.b.a.
D & M Contracting Co.,
Plaintiff,

v. Case No. 95-1210-Civ-J-20B

FIRST UNION NATIONAL BANK
OF FLORIDA
Defendant.

ORDER

Plaintiff's Motion for an Order to Amen or Alter Court Judgment (Doc. No. 63, filed February 14, 1997) and Petition to Court to Enter Second Amended Complaint (Doc. No. 64, filed February 14, 1997) are DENIED.

DONE AND ORDERED at Jacksonville, Florida this 4th day of March, 1997.

Harvey E. Scheslinger
United States District Judge

Copies to:
Ernest McDuffie, III
Michael Freeed, Esq.
Garry Randolph
Law Clerk

appendix 24

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Filed: January 9, 1997

individually d.b.a.
D & M Contracting Co.,
Plaintiff,

v. Case No. 95-1210-Civ-J-20B

FIRST UNION NATIONAL BANK
OF FLORIDA
Defendant.

ORDER

Before the Court are Defendant's Second Motion to Remove Action from Trial Calendar Pending Resolution of Dispositive Motion (Doc. No. 51, filed December 23, 1996) and Plaintiff's Motion for an Order Denying Defendant's Second Motion to Remove Action from Trial Calendar (Doc. 52, filed January 3, 1997; "Plaintiff's Response"). Defendant's Motion is Granted. The Clerk will remove this action from the trial calendar pending resolution of Defendant's dispositive Motion.

The Court expects to rule shortly on Defendant's Motion for Summary Judgment (Doc. No. 25, filed August 6, 1996). In the event that summary judgment is denied, the Court will advise the parties of the new dates for pretrial conference and trial.

This Court's Order granting Plaintiff's Motion Requesting Meeting Room (Doc. No. 58, filed January 8, 1997) is hereby VACATED. in the event that summary judgment is denied, the Court will again provide a room in which the parties can meet.

DONE AND ORDERED at Jacksonville, Florida, this 8th day of January, 1997.

Harvey E. Schesinger
United States District Judge

Copies to:
Ernest McDuffie, III
Michael Freeed, Esq.
Garry Randolph
Law Clerk

appendix 26

(477 US 317)
CELOTEX COPORATION, PETITIONER
v
MYRTLE NELL CATRETT, Administratrix of the Estate of LOUIS H. CATRETT, Deceased

477 US 317, 91 L Ed 2d 265, 106 S Ct 2548

[No. 850198]

Argued April 1, 1986. Decided June 25, 1986.

Decision: Party moving for summary judgment held not required by Rule 56 of Federal Rules of Civil Procedure to support motion with affidavits or other similar materials negating opponent's claim.

SUMMARY

A widow sued in the United States District Court for the District of Columbia, alleging that her husband's death resulted from his exposure to asbestos manufactured or distributed by 15 named corporations. One corporation moved for summary judgment, claiming that the plaintiff had failed to produce evidence that her husband had been exposed to its asbestos products. The plaintiff produced documents tending to show such exposure, but the moving party argued that they were inadmissible hearsay and could not be considered in opposition to the motion for summary judgment. The District Court granted the motion, holding that there had been no showing the decedent had been exposed to the moving party's products in the District of Columbia or elsewhere. The United States Court of Appeals for the District of Columbia Circuit reversed, holding that the moving party had not adduced evi-

dence, in the form of affidavits or otherwise, to support its motion, and that Rule 56(e) of the Federal Rules of Civil Procedure and the decision of the United States Supreme Court in Adickes v S. H. Kress & Co. 398 US 144, 26 L Ed 2d 142, 90 S Ct 1598, required that the party opposing the motion for summary judgment bore the burden of responding only after the moving party had met its burden of coming forward with proof of the absence of any genuine issue of material fact (244 App DC 160, 756 F2d 181).

On certiorari, the United States Supreme Court reversed and remanded the case for further proceedings. In an opinion by REHNQUIST, J., joined by WHITE, MARSHALL, POWELL, and O'CONNOR, JJJ., it was held that the position taken by the majority of the Court of Appeals was inconsistent with the standard for summary judgment set forth in Rule 56(c) of the Federal Rules of Civil Procedure, because Rule 56 did not require the moving party to support its motion with affidavits or other similar materials negating the opponent's claim, Rule 56(c) suggesting the absence of such requirement when it referred to "the affidavits, if any," and because the decision in Adickes v. S. H. Kress & Co. should not be construed to mean that the burden is on the moving party to produce evidence showing the absence of a genuine issue of material fact.

WHITE, J., concurred in the court's opinion and judgment, expressing the view that while the Court of Appeals was wrong in holding that the moving party must always support his motion with evidence to affidavits showing the absence of a genuine dispute about a material fact, the moving party must discharge the burden that the rules placed upon him

and it was not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff had no evidence to prove his case.

BRENNAN, J., joined by BURGER, Ch. J., and BLACKMUN, J., dissented, expressing the view that while the Court of Appeals erroneously read the decision in Adickes v S. H. Kress & Co., when it required the moving party to submit evidence establishing that the widow's decedent had not been exposed to the moving party's asbestos, and while the moving party could seek summary judgment on the ground that the widow could not prove exposure to the moving party's asbestos at trial, the moving party was nevertheless still required to satisfy its initial burden of production under Rule 56, and it had failed to do so, thereby rendering summary judgment improper.

STEVENS, J., dissent, expressing the view that, in the context of the motion for summary judgment based on the decedent's lack of exposure to the moving part's asbestos in the District of Columbia, the District Court's decision to grant the motion was erroneous and the reversal of summary judgment should have been affirmed on the narrow ground that the widow had made an adequate showing that the decedent had been exposed to the moving party's asbestos in Illinois.

Briefs of Counsel, p 660, infra.

appendix 29

477 US 317, 91 L Ed 2d 265, 106 S Ct 2548

HEADNOTES

Summary Judgment and Judgment on the Pleadings
3- summary judgment - evidence negating nonmoving party's claim

1a-1e. In a wrongful death action in Federal District Court arising from the death of the plaintiff's husband allegedly due to exposure to asbestos manufactured or distributed by named corporations, where one corporation moved for summary judgment on the ground that the plaintiff failed to produce evidence showing the decedent's exposure to the moving part's asbestos, the decision of the Federal Court of Appeals reversing the grant of summary judgment on the ground that the moving party failed to produce proof of the absence of any genuine issues of material fact is inconsistent with standard for summary judgment set forth in Rule 56(c) of the Federal Rules of Civil Procedure, because (1) Rule 56 does not require that the moving party support its motion with affidavits or other similar materials negating the opponent's claim, Rule 56(c) suggesting the absence of such requirement when it refers to " the affidavits, if any",: (2) Rule 56(e), in requiring the nonmoving party to come forward with rebuttal affidavits or other specified kinds of materials only in response to a motion for summary judgment "made and supported as provided in this rule," does not require that the motion be supported by affidavits, since,

in a case such as the instant one where the nonmoving party will bear the burden of proof at trial on a dispositive issue, the moving party may rely solely on the pleadings, depositions, answers to interrogatories, and admissions on file, and such a motion will be "made and supported as provided in this rule",; and (3) the statement in Adickes b. S.H. Kress & Co., 398 US 144, 26 L Ed 2d 142, 90 S Ct 1598, that the moving party must show initially the absence of a genuine issue concerning any material fact, should not be construed to mean that the moving party must produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof, but should instead be understood as requiring the moving party to discharge his burden by showing - that is, pointing out to the District Court-that there is an absence of evidence to support the nonmovng party's case. (Stevens, J., dissented from this holding.)

Summary Judgment and Judgment on the Pleadings
5 - summary judgment - nonmoving party's burden

2. The plain language of Rule 56(c) of the Federal Rules of Civil Procedure mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial; in such a situation, there can be no

genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial; the moving party is entitled to judgment as a matter of law because the nonmoving party has failed to make sufficient showing on an essential element of his case with respect to which he has the burden of proof.

Summary Judgment and Judgment on the Pleadings
3 - summary judgment - moving party's burden

3. A party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes will demonstrate the absence of any genuine issue of material fact.

Summary Judgment and Judgment on the Pleadings
1 - summary judgment - purpose

4. One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and the rule should be interpreted in a way that allows it to accomplish this purpose.

Summary Judgment and Judgment on the Pleadings
4 - summary judgment - nonmoving party's proof

5. The nonmoving party is not required to produce evidence in a form that would be admissible at trial in order to avoid summary judgment; Rule 56 of the Federal Rules of Civil Procedure does not require the nonmov-

party to depose his own witnesses; 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that would normally expect the nomoving party to show that there is a genuine issue for trial.

Summary Judgment and Judgment on the Pleadings 6 - summary judgment - premature motion

6. The plaintiff in an action in Federal District Court cannot claim to have been "railroaded" by a premature motion for summary judgment, where the motion is filed 12 months after the commencement of the action; any potential problem with a premature motion can be adequately dealt with under Rule 56(f) of the Federal Rules of Civil Procedure, which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery.

Appeal 1692.2 - summary judgment - issues not determined - remand

7. In a wrongful death action in Federal District Court arising from the death of the plaintiff's husband allegedly due to exposure to asbestos manufactured or distributed by named corporations, where one corporation moved for summary judgment on the ground that the plaintiff failed to produce evidence showing the decedent's

exposure to the moving party's asbestos, and the plaintiff produced documents tending to show such exposure, but the moving party argued that they were inadmissible hearsay and could not be considered in opposition to the motion for summary judgment, and where the United States Supreme Court reverses and remands for further proceedings of the Federal Court of Appeals which reversed summary judgment for the moving party's failure to produce evidence negating the nonmoving party's claim, the Supreme Court will leave to the Court of Appeals the determination of the adequacy of the showing made by the plaintiff in opposition to the motion for summary judgment and whether such a showing, if reduced to admissible evidence, would be sufficient to carry the plaintiff's burden of proof at trial, because that court with its superior knowledge of local law is better suited than the Supreme Court to make these determinations in the first instance.

Summary Judgment and Judgment on the Pleadings
3, 4 - summary judgment - construction of Rule 56

8. Rule 56 of the Federal Rules of Civil Procedure must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons

opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have not factual basis.

SYLLABUS BY REPORTER OF DECISIONS

In September 1980, respondent administratrix filed this wrongful death action Federal District Court, alleging that her husband's death in 1979 resulted from his exposure to asbestos products manufactured or distributed by the defendants, who included petitioner corporation. In September 1981, petitioner filed a motion for summary judgment, asserting that during discovery respondent failed to produce any evidence to support her allegation that the decedent had been exposed to petitioner products. In response, respondent produced documents tending to show such exposure, but petitioner argued that the documents were inadmissible hearsay and thus could not be considered in opposition to the summary judgment motion. In July 1982, the court granted the motion because there was no showing of exposure to petitioner's products, but the Court of Appeals reversed, holding that summary judgment in petitioner's favor was precluded because of petitioner's failure to support its motion with evidence tending to negate such exposure, as required by Federal Rule of Civil Procedure 56(e) and the decision in Adickes V. S.H. Kress & Co. 398 US 144, 26 L Ed 2d 142, 90 S Ct 1598.

Held:

1. The Court of Appeals' position is inconsistent with the standard for summary judgment set forth in Rule 56(c), which provides that summary judg

ment is proper "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

(a) The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof.

(b) There is no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim. On the contrary, Rule 56(c), which refers to the affidavits, "if any," suggests the absence of such a requirement, and Rules 56(a) and (b) provide that claimants and defending parties may move for summary judgment "with or without supporting affidavits." Rule 56(e), which relates to the form and use of affidavits and other materials, does not require that the moving party's motion always be supported by affidavits to show initially the absence of a genuine issue for trial. Adickes v. S. H. Kress & Co., supra, explained.

(c) No serious claim can be made that respondent was "railroaded" by a premature motion for summary judgment, since the motion was not filed until one year after the action was commence and since the parties had conducted discovery. Moreover, any potential problem with such premature motions can be adequately dealt with under Rule 56(f).

2. The questions whether an adequate showing of exposure to petitioner's products was in fact made by respondent in opposition to the motion, and whether such a showing, if reduced to admissible evidence, would be sufficient to carry respondent's burden of proof at trial, should be determined by the Court of Appeals in the first instance.

244 US App DC 160, 756 F2d 181, reversed and remanded. Rehnquist J., delivered the opinion of the Court, in which White, Marshall, Powelll, and O'Connor, JJ,. joined. White, J., filed a concurring opinion. Brennan, J., filed a dissenting and Blackman, J., joined. Stevens, J., filed a dissenting opinion.

APPEARANCE OF COUNSEL

Leland S. Van Koten argued the cause for petitioner.

Paul March Smith argued the cause for respondent. Briefs of Counsel, p 660, infra.

OPINION OF THE COURT

(477 US 319)

Justice Rehnquist delivered the opinion of the Court.

[1a] The United States District Court for the District of Columbia granted the motion for petitioner Celotex Corporation for summary judgment against respondent Catrett because the latter was unable to produce evidence in support of her allegation in her

wrongful-death complaint that the decedent had be exposed to petitioner's asbestos products. A divided panel of the Court of Appeals for the District of Columbia Circuit reversed, however, holding that petitioner's failure to support its motion with evidence tending to negate such exposure precluded the entry of summary judgment in is favor. Catrett b Johns-Manville Sales Corp,. 244 US App DC 160, 756 F2d 181 (1985). This view conflict with that of the Third Circuit in In re Japanese Electronic Products, 723 F2d 238 (1983), rev'd on other grounds sub nom Matsushita Electric Industrial Co, v. Zenith ?Radio Corp. 475 US 574, 89 L Ed 2d 538, 106 S Ct 1438 (1986).[1] We granted certiorari to resolve the conflicted, 474 US 944, 85 L Ed 2d 157, 105 S Ct 1863 (1985), and now reverse the decision of the District of Columbia Circuit.

Respondent commence this lawsuit in September 1980, alleging that the death in 1979 of her husband, Louis H. Catrett, resulted from his exposure to products containing asbestos manufactured or distributed by 15 named corporations. Respondent's complaint sounded in negligence, breach of warranty, and strict liability. Two of the defendants filed motions challenging the District Court's in personam jurisdiction, and the remaining 13, including petitioner, filed motions for summary judgment. Petitioner's motion, which was first filed in September 1981, argued that summary judgment was proper because respondent had "failed to produce evidence that any [Celotex] product . . . was the proximate cause of the injuries alleged within the jurisdictional [477 US 320] limits of [the District] Court," In particular, petitioner noted that respondent had failed to identify,

1. Since our grant of certiorari in this case, the Fifth Circuit has rendered a decision squarely rejecting the position adopted her by

in answering interrogatories specifically requesting such information, any witness who could testify about the decedent's exposure to petitioner's asbestos products. In response to petitioner's summary judgment motion, respondent then produced three documents which she claimed "demonstrate that there is a genuine material factual dispute" as to whether the decedent had ever been exposed to petitioner's asbestos products. The three documents included a transcript of a deposition of the decedent, a letter from an official of one of the decedent's former employers whom petitioner planned to call as a trial witness, and a letter from an insurance company to respondent's attorney, all tending to establish that the decedent had been exposed to petitioner's asbestos products in Chicago during 1970-71. Petitioner, in turn, argued that the three documents were inadmissible hearsay and thus could not be considered in opposition to the summary judgment motion.

In July 1982, almost two years after commencement of the lawsuit, the District Court granted all of the motions filed by the various defendants. The court explained that it was granting petitioner's summary judgment motion because "there [was] no showing that the plaintiff was exposed to the defendant Celotex's product in the District of Columbia or elsewhere within the statutory period." App217.[2]

Respondent [477 US 321]

Respondent appealed only the grant of summary judgment in favor of petitioner, and a divided panel of the District of Columbia Circuit reversed. The majority of the Court of Appeals held that petitioner's summary judgment motion was rendered "fatally defective" by the fact that petitioner "made no effort to adduce any evidence, in the form of affidavits or otherwise, to support its motion." 244

US App DC, at 163, 756 F2d, at 184 (emphasis in original). According to the majority, Rule 56(e) of the Federal Rules of Civil Procedure,[1] and this Court's decision in Adickes b S. H. Kress & Co. 398 US 144, 159, 26 L Ed 2d 142, 90 S Ct 1598 (1970), establish that "the party opposing the motion for summary judgment bears the burden of responding only after the moving party has met its burden of coming forward with proof of the absence of any genuine issues of material fact." 244 US App DC, at 163, 756 [477 US 322} F2d, at 184 (emphasis in original; footnote omitted). The majority therefore declined to consider petitioner's argument that none of the evidence produced by respondent in opposition to the decision in Adickes b S. H. Kress & Co. 398 US 144, 159, 26 L Ed 2d 142, 90 S Ct 1598 (1970), establish that "the party opposing the motion for summary judgment bears the burden of responding only after the moving party has met its burden of coming forward with proof of the absence of any genuine issues of material fact." 244 US App DC, at 163, 756 motion for summary judgment would have been admissible at trial. Ibid. The dissent judge argued that "[t]he majority errs in supposing that a party seeking summary judgment must always make an affirmative evidentiary showing, even in case where

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the District of Columbia Circuit. See Fontenot v Upjohn Co. 780 F2d 1190(1986).

2. Justice Stevens, in dissent, argues that the District Court granted summary judgment only because respondent presented no evidence that the decedent was exposed to Celotex asbestos products in the District of Columbia. See post, at 338-339, 91 L Ed 2d at 283. According to Justice Stevens, we should affirm the decision of the Court of Appeals, reversing the District Court, on the "narrower ground" that respondent "made an adequate showing"

there is not a triable, factual dispute." Id,. at 167, 756 F2d, at 188 (Bork, J., dissenting). According to the dissenting judge, the majority's decision "undermines the traditional authority of trial judges to grant summary judgment in meritless cases." Id, at 166, 756 F2d, at 187.

{1b, 2] We think that the position taken by the majority of the Court of Appeals is inconsistent with the standard for summary judgment set forth in Rule 56(c) of the Federal Rules of Civil Procedure.4 Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who

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that the decedent was exposed to Celotex asbestos products in Chicago during 1970-71. See post, at 338-339, 91 L Ed 2d, at 283.

Justice Stevens' position is factually incorrect. The District Court expressly stated that respondent had made no showing of exposure to Celotec, asbestos products "in the District of Columbia or elsewhere." App 217 (emphasis added). Unlike Justice Stevens, we assume that the District Court meant what it said. The majority of the Court of Appeals addressed the very issue raised by Justice Stevens, and decided that " "[the District Court's grant of summary judgment must therefore have been based on its conclusion that there was "no showing that the plaintiff was exposed to defendant Celotex's product in the District of Columbia or elsewhere within the statutory period.' " Catrett v Johns-Manville Sales Corp,244 US App Dc 160, 162, n 3, 756 R2d 181, 183, n 3 (1985) (emphasis in original). In other words, no judge involved in this case to date shares Justice Stevens' view of the District Court's decision.

fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, [477 US 323]

there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. "[T]h[e] standard [for granting summary judgment] mirrors the standard for a direct verdict under Federal Rule of Civil Procedure under Federal Rule of Civil Procedure 50(a). . . ." Anderson b Liberty Lobby inc., ante, at 250, 91 L Ed 2d 202, 106 S Ct 2505 (1986).

[1c,3, 4] Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. But unlike the Court of Appeals, we find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim. On the contrary, Rule 56(c), which refers to "the affidavits, in any" (emphasis added), suggests the absence of such a requirement. And if there were any doubt about the meaning of Rule 56(c) in this regard such doubt is clearly removed by Rules 56(a) and (b), which provide that claimants and defendants, respectively, may

move for summary judgment "with or without supporting affidavits" (emphasis added). The import of these subsections is that, regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied. One of the principle purposes of the summary judgment rule is to isolate and dispose of factually unsupported [477 US 324] claims or defense, and we think it should be interpreted in a way that allows it to accomplish this purpose.5

[1d] Respondent argues, however, that Rule 56(e), by its terms, places on the nonmoving party the burden of coming forward with rebuttal affidavits, or other specified kinds of materials, only in response to a motion for summary judgment "made and supported as provided in this rule." According to respondent's argument, since petitioner did not "support" its motion with affidavits, summary judgment was improper in this case. But as we have already explained, a motion for summary judgment may be made pursuant to Rule 56 "with or without supporting affidavits." In case like the instant one, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleadings, depositions, answers to interrogatories, and admissions on file," Such a motion, whether or not accompanied by affidavits, will be "made and supported as provided

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competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an

in this rule," and Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial."

[5] We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Obviously, Rule 56 does not require the nonmoving party to depose her own witnesses. Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred.

[477 US 325]
[1e] The Court of Appeals in this case felt itself constrained, however, by language in our decision in Adickes v S. H. Kress & Co. 398 US 144, 26 L Ed 2d 142, 90 S Ct 1598 1970). There we held that summary judgment had been improperly entered favor of defendant restaurant in an action brought under 42 USC 1983 [42 USCS 1983]. In the course of its opinion, the Adickes Court said that "both the commentary on and the background of the 1963 amendment conclusively show that it was not intended to modify the burden of the moving party . .

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affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions , answers to interrogatories, or further affidavits.

show initially the absence of a genuine issue concerning any material fact." Id., at 159, 26 L Ed 2d 142, 90 S 1598. We think that this statement is accurate in a literal sense, since we fully agree with the Adickes Court that the 1963 amendment to Rule 56(e) was not designed to modify the burden of making the showing generally required by Rule 56(c). It also appears to us that, on the basis of the showing before the Court in Adickes, the motion for summary judgment in that case should have been denied. But we no not think the Adickes language quoted above should be construed to mean that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof. Instead as we have explained, the burden on the moving party may be discharged by "showing" - that is , pointing out to the district court - that there is an absence of evidence to support the nonmoving party's case.

The last two sentences of Rule 56(e) were added, as this Court indicated in Adickes, to disapprove a

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supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."
rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.".

to show initially the absence of a genuine issue concerning any material fact." Id., at 159, 26 L Ed 2d 142, 90 S 1598. We think that this statement is accurate in a literal sense, since we fully agree with the Adickes Court that the 1963 amendment to Rule 56(e) was not designed to modify the burden of making the showing generally required by Rule 56(c). It also appears to us that, on the basis of the showing before the Court in Adickes, the motion for summary judgment in that case should have been denied. But we no not think the Adickes language quoted above should be construed to mean that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof. Instead as we have explained, the burden on the moving party may be discharged by "showing" - that is , pointing out to the district court - that there is an absence of evidence to support the nonmoving party's case.

The last two sentences of Rule 56(e) were added, as this Court indicated in Adickes, to disapprove a line of cases allowing a party opposing summary judgment too resist a properly made motion by reference only to its pleadings. While the Adickes Court was undoubtedly correct in concluding that these two sentences were not intended to reduce the burden of the moving party, it is also obvious that they were not adopted to add to that burden. Yet that is exactly the result which the reasoning of the Court of Appeals would produce; in effect, an amendment to Rule 56(e) designed to {477 US 326] facilitate the granting of motions for summary judgment would be interpreted to make it more dif-

ficult to grant such motions. Nothing in the two sentences themselves requires this result, for the reasons we have previously indicated, and we now put to rest any inference that they do so.

Our conclusion is bolstered by the fact that district courts are widely acknowledged to possess the power to enter summary judgments sua sponte, so long as the losing party was on notice that she had to come forward with all of her evidence. See 244 US App, DC, at 167-168, 756 F2d, at 189 (Bork, J., dissenting); 10A C. Wright, A. Miller, & M Kane, Federal Practice and Procedure 2720, pp 28-29 (1983). It would surely defy common sense to hold that the District Court could have entered summary judgment sua sponte in favor of petitioner in the instant case, but that petitioner's filing of a motion requesting such a disposition precluded the District Court from ordering it.

[6] Respondent commenced this action in September 1980, and petitioner's motion was filed in September 1981. The parties had conducted discovery, and no serious claim can be made that respondent was in any sense "railroaded" by a premature motion for summary judgment. Any potential problem with such premature motions can be adequately dealt with under Rule 56(f)).[6] which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has

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4. Rule 56(c) provides: "The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitle to judgment as a

not had an opportunity to make full discovery.

[7] In this Court, respondent's brief and oral argument have been devoted as much to the proposition that an adequate showing of exposure to petitioner's asbestos products was [477 US 327]

made as to the proposition that no such showing should have been required. But the Court of Appeals declined to address either the adequacy of the showing made by respondent in opposition to petitioner's motion for summary judgment. or the question whether such a showing, if reduced to admissible evidence, would be sufficient to carry respondent's budded of proof at trial. We think the Court of Appeals with its superior knowledge of local law is better suited than we are to make these determinations in the first instance.

[8] The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact. Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as in integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." Fed Rule Civ Proc 1; se Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99FRD 465, 467 (1984). Before the shift to "notice pleading" accomplished by the Federal Rules, motions to dismiss a complaint or to strike a defense were the principal tools by which factually insufficient claims or defense could be isolated and pre

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matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

vented from going to trial with the attendant unwarranted consumption of public and private resources. But with the advent of "notice pleadings," the motion to dismiss seldom fulfills this function any more, and its place has been taken by the motion for summary judgment. Rule 56 must be constructed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defended tried to a jury, but also for the rights of person opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

477 US 328]

The judgment of the Court of Appeals is accordingly reverse, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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5. See Louis, Federal Summary Judgment Doctrine: A Critical Analysis, 83 Yale LJ 745, 752 (1974); Currie, Thoughts on Di rected Verdicts and Summary Judgments, 45 U Chi L Rev 72, 79 (1977).

6. Rule 56(f) provides:
"Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts es sential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or deposition to be taken or discovery to be had or may make such other order as is just."

SEPARATE OPINIONS

Justice White, concurring,

I agree that the Court of Appeals was wrong in holding that the moving defendant must always support his motion with evidence or affidavits showing the absence of a genuine dispute about a material fact. I also agree that the movant may rely on depositions, answers to interrogatories, and the like, to demonstrate that the plaintiff has no evidence to prove his case and evidence that there can be no factual dispute. But the movant must discharge the burden the Rules place on him: It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case.

A plaintiff need not initiate any discovery or reveal his witnesses or evidence unless required to do so under the discovery Rules or by court order. Of course, he must respond if required to do so; but he need not also depose his witnesses or obtain their affidavits to defeat a summary judgment motion asserting only that he has failed to produce any support for his case. It is the defendant's task to negate, if he can, the claimed basis for the suit.

Petitioner Celotex does not dispute that if respondent has named a witness to support her claim, summary judgment should not be granted without Celotex somehow showing that the named witness' possible testimony raise no genuine issue of material fact. Tr of Oral Arg 43, 45. It asserts, however, that respondent has failed on request to produce any basis for her case. Respondent, on the other hand, does not contend that she was not obligated to reveal her witnesses and evidence but insists that she has revealed enough to defeat the motion for

summary judgment. Because the Court of Appeals found it unnecessary to address this aspect [477 US 329] of the case, I agree that the case should be remanded for further proceedings.

Justice Brennan, with whom The Chief Justice and Justice Blackmun join, dissenting.

This case requires the Court to determine whether Celotex satisfied its initial burden of production in moving for summary judgment on the

ground that the plaintiff lacked evidence to establish an essential element of her case at trial. I do not disagree with the Court's legal analysis. The Court clearly rejects the ruling of the Court of Appeals that the defendant must provide affirmative evidence disproving the plaintiff's case. Beyond this, however, the Court has not clearly explained what is required of a moving party seeking summary judgment on the ground that the nonmoving party cannot prove its case./ This lack of clarity is unfortunate district courts must routinely decide summary judgment motions, and the Court's opinion will very likely create confusion. For this reason, even if I agreed with Court's result, I would have written separately explain more clearly the law in this area. However, because I believe that Celotex did not meet its burden of production under Federal Rule of Civil Procedure 56, I respectfully dissent from the Court's judgment.

[477 US 330]

Summary judgment is appropriate where the court is satisfied "that there is no genuine issue as to any material bat and that the moving party is

entitle to a judgment as a matter of law." Fed Rule Civ Proc 56(c). The burden of establishing the nonexistence of a "genuine issue" is on the party moving for summary judgment. 10A C. Wright, A. Miller & M. Kane, General Practice and Procedure 2727, p 121 (2d ed 1983) hereinafter Wright) (citing cases); b J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice 56.15[3] (2d ed 1985) (hereinafter Moore) (citing cases). See also, ante, at 323, 91 L Ed 2d, at 273-274; ante, at 328, 91 L Ed 2d, at 277 (White, J., concurring). This burden has two distinct components: an initial burden of production, which shifts to the nonmoving party if satisfied by the moving party; and an ultimate burden of persuasion, which always remains on the moving party. See 10A Wright 2727. The court need not decide whether the moving party has satisfied its ultimate burden of persuasion [2] unless and until the court finds that moving party has discharged its initial [477 US 331] burden of production. Adickes v S. H. Kress & Co., 398 US 144, 157-161, 51 L Ed 2d 260, 97 S Ct 990 (1970); 1963 Advisory Committee's Notes on Fed Rule Civ Proc. 56(e), 28 USC App, p 626 [USCS Court Rules, Fed Rules of Civ Proc, Notes following Rule 56].

The burden of production imposed by Rule 56 requires the moving [arty to make a prima facie

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1. It is also unclear what the Court of Appeals is suppose to do in this case on remand. Justice White - who has provided the Court's fifth vote - plainly believes that the Court of Appeals should reevaluate whether the defendant met its initial burden of production. However, the decision to reverse rather than to vacate the judgment below implies that the Court of Appeals should assume that Celotex has met its initial burden of production and ask only whether the plaintiff responded adequately, and, if so, whether the

showing that it is entitle to summary judgment. 10A Wright 2727. The manner in which this showing can be made depends on which party will bear the burden of persuasion at trial, that party must support its motion with credible evidence - using any of the materials specified in Rule 56(c) - that would entitle it to a directed verdict if not controverted at trial. Ibid. Such an affirmative showing shifts the burden of production to the party opposing the motion and requires that party either to produce evidentiary materials that demonstrate the existence of a "genuine issue" for trial or to submit an affidavit requesting additional time for discovery. Ibid; Fed Rules Civ Proc. 56(e), (f).

If the burden of persuasion at trial would be on the nonmoving party, the party moving for summary judgment may satisfy Rule 56's burden of production in either of two ways. First, the moving party may submit affirmative evidence that negates an essential element of the nonmoving party's claim.. Second, the moving party may demonstrate to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. See 10A Wright 2727, pp 130-131;Louis, Federal; Summary Judgment Doctrine; A Critical Analysis, 83 Yale LJ 745, 750 (1974) (hereinafter Louis). If the nonmoving party cannot muster sufficient evidence to make out its claim, a trial would be useless and the moving party is entitle to sumnary judgment as a matter of law. Anderson

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defendant has met its ultimate burden of persuasion that no genuine issue exits for trial. Absent some clearer expression from the Court to the contrary, Justice White's understanding would seem to be controlling. Cf. Marks b United States, 430 US 188, 193, 51 L Ed 2d 260, 97 S Ct 990 (1977).

v Liberty Lobby, Inc., ante, at 249, 92 L Ed 2d 202, 106 S Ct 2505.

Where the moving party adopts this second option and seeks summary judgment on the ground that the nonmoving party - who will bear the burden of persuasion at trial - has [477 US 332] no evidence, the mechanics of discharging Rule 56's burden of production are somewhat trickier. Plainly, a conclusory assertion that the nonmoving party has no evidence is insufficient. See ante, at 328, 91 L Ed 2d, at 277 (White, J., concurring). Such a "burden" of production is no burden at all and would simply permit summary judgment procedure to be converted into a tool for harassment. See Louis 750-751. Rather, as the Court confirms, a party who moves for summary judgment on the ground that the nonmoving party has no evidence must affirmatively show the absence of evidence in the record. Ante, at 323, 91 L Ed 2d, at 273. This may require the moving party to depose the nonmoving party's witnesses or to establish the inadequacy of documentary evidence. If there is literally no evidence in the record, the moving party may demonstrate this by reviewing for the court the admissions, interrogatories and other exchanges between

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2. The burden of persuasion imposed on a moving party by Rule 56 is a stringent one. 6 Moore 56.15[3], p56-466; 10A Wright 2727, p124. Summary judgment should not be granted unless it is clear that a trial is unnecessary, Anderson v Liberty Lobby, Inc., ante, at 255, 91 L Ed 2d 202, 106 S Ct 2505, and any doubt as to the existence of a genuine issue for trial should be resolved against the moving party, Adickes v S. H. Kress & Co. 398 US 144, 158-159, 51 L Ed ed 260, 97 S Ct 990 (1970). In determining whether a moving party has met its burden of persuasion,

the parties that are in the record. Either way, however, the moving party must affirmatively demonstrate that there is no evidence in the record to support a judgment for the nonmoving party.

If the moving party has not fully discharged this initial burden of production, its motion for summary judgment must be denied, and the court need not consider whether the moving party has met its ultimate burden of persuasion. Accordingly, the nonmoving party may defeat a motion for summary judgment that assets that the nonmoving party has no evidence by calling the court's attention to supporting evidence already in the record that was overlooked or ignored by the moving party. In that event, the moving party must respond by making an attempt to demonstrate the inadequacy of this evidence, for it is only by attaching all the record evidence allegedly supporting the nonmoving party that a party seeking summary judgment satisfies Rule 56's burden of production. 3 Thus, if the record disclosed that the moving [477 US 333] party had overlooked a witness who would provide relevant testimony for the nonmoving party at trial, the court could not find that the moving party had discharged its initial burden of production unless the moving party sought to demonstrate the inadequacy of this witness' testimony. Absent such a demonstration, summary judgment would have to be denied on the ground that the moving party had failed to meet its burden of production under Rule 56.

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the court is obliged to take account of the entire setting of the case and must consider all papers or records as well as any materials prepared for the motion. 10A Wright 2721, p 44; see, eg Stepanischen v Merchants Despatch Transportation Corp, 722 F2d 922, 930 (Ca1 a983); Higgenbotham b Ochsner Foundation Hosp,

The result in Adickes v S. H. Kress & Co. supra, I fully consistent with these principles. In that case, petitioner was refused service in respondent's lunchroom and them was a arrested for vagrancy by a local policeman as she left. Petitioner brought an

action under 42 USC 1983 [42 USCS 1983] claiming that the refusal of service and subsequent arrest were the product of a conspiracy between respondent and the police; as proof of this conspiracy, petitioner's complaint alleged that the arresting officer was in respondent's store at the time service was refused. Respondent subsequently moved for summary judgment on the ground that there was no actual evidence in the record from which a jury could draw an inference of conspiracy. In response, petitioner pointed to a statement from her own deposition and an unsworn statement by a Kress employee, both already in the record and both ignored by respondent, that the policeman who arrested petitioner was in the store at the time she was refused service. We agreed that "[i]f a policeman were present, . . . it would be open to a jury, in light of the sequence that followed, [477 US334] to infer from the circumstances that the policeman to infer from the circumstances that the policeman and Kress employee had a 'meeting of the minds'

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607 F2d 653, 656 (CA5 1979). As explained by the Court of Appeals for the Third Circuit in In re Japanese Electronic Products Antitrust Litigation, 723 F2d 238 (1983), rev'd on other grounds sub nom. Matsushita Electric Industrial Co. v Zenith Radio Corp. 475 US 574, 89 L Ed 2d 538, 106 S Ct 1348(1986), "[i]f . . . there is any evidence in the record from any source from which a reasonable inference in the [nonmoving party's] favor may be drawn, the moving party simply cannot obtain a summary judgment . . . ." 723 F2d, at 258.

and thus of the mind's and thus reached an under standing that petitioner should be refused service." 398 US, at 158, 26 L Ed 2d 142, 90 S Ct 1598. Consequently, we held that it was error to grant summary judgment "on the basis of this record" because respondent had "failed to fulfill its initial burden" of demonstrating that there was no evidence that there was a policeman in the store. Id,. at 157-158, 26 L Ed 2d 142, 90 S Ct 1598.

The opinion in Adickes has sometimes been read to hold that summary judgment was inappropriate because the respondent had not submitted affirmative evidence to negate the possibility that there was a policeman in the store. See Brief for Respondent 20, n 30 (citing cases). The Court of Appeals apparently read Adickes this way and therefor required Celotex to submit evidence establishing that plaintiff's decedent had not been exposed to Celotex asbestos. I agree with the Court that this reading of Adickes was erroneous and that Celotex could seek summary judgment on the ground that plaintiff could not prove exposure too Celotex asbestos at trial. However, Celotex was still required to satisfy its initial burden of production.

II

I do not read the Court's opinion to say anything inconsistent with or different from the preceding discussion. My disagreement with the Court concerns the application of these principles to the facts of this case.

Defendant Celotex sought summary judgment on the ground that plaintiff had "failed to produce" any evidence that her decedent had ever been exposed to Celotex asbestos.4

App 170 Celotex supported this motion with a 477 US 325] 2-page "Statement of Material Facts as to Which There is No Genuine Issue" and a 3-page "Memorandum of Points and Authorities" which asserted that the plaintiff had failed to identify any "Memorandum of Points and Authorities" which asserted that the plaintiff had failed to identify any evidence in responding to two sets of interrogatories propounded by Celotex and that therefore the record was "totally devoid" of evidence to support plaintiff's claim. See id, at 171-176.

Approximately three months earlier, Celotex had filed an essentially identical motion. Plaintiff responded to this earlier motion by producing three pieces of evidence which she claimed "[a]t the very least . . . demonstrate that there is a genuine factual dispute for trial," id., at 143, 26 L Ed 2d 142, 90 S Ct 1598; (1) a letter from an insurance representative of another defendant describing asbestos products to which plaintiff's decedent had been exposed, id., at 160, 26 L Ed 2d 142, 90 S Ct 1598. (2) a letter from T. R. Hoff, a former supervisor of decedent, describing asbestos products to which decedent had been exposed, id., at 162, 26 L Ed 2d 142, 90 S Ct 1598; and (3) a copy of decedent's deposition from earlier workmen's compensation proceedings, id., at 164, 26 L Ed 2d 142, 90 S Ct 1598. Plaintiff also apparently indicated [477 US 336] at that time that she intended to call Mr. Hoff as a witness at trial. Tr of Oral Arg 6-7, 27-29. Celotex subsequently withdrew its first motion for summary judgment. See App 1267.[5] However, as a

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3. Once the moving party has attached whatever record evidence - if any - the nonmoving party purports to rely upon, the burden of production shifts to the nonmoving party, who must either (1) rehabilitate the evidence attacked in the moving party's papers (2)

result of this motion, when Celotex filed its second summary judgment motion, the record did contain evidence - including at least one witness - supporting plaintiff's claim. Indeed, counsel for Celotex admittedto this Court at oral argument that ?Celotex was aware of this evidence and of plaintiff's intention to call Mr. Hoff as a witness at trial when the second summary judgment motion was filed. Tr of Oral Arg 507.

Moreover, plaintiff's response to Celotex second motion pointed to this evidence - noting, that it had already been provided to counsel for Celotex in connection with first motion - and argued that Celotex had failed to "meet its burden of proving that there is no genuine factual dispute for trial." App 188.

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that what the District Court said was that plaintiff had failed to show exposure in the District of Columbia "or elsewhere." Ante, at 320, n 2, 91 L Ed 2d, at 272. In my view, it does not really matter which reading is correct in this case. For, contrary to Justice Stevens' claim, deciding this case on the ground that Celotex, failed to meet its burden of production under Rule 56 does not involve an "abstract exercise in Rule construction." Post, at 339, 91 L Ed 2d, at 284)Stevens, J., dissenting). To the contrary, the principles governing a movant's burden of proof are straightforward and will established, and deciding the case on this basis does not require a new construction of Rule 56 at all; it simply entails applying established law to the particular fats of this case. The choice to reverse because of "palpable erro[r]" with respect to the burden of a moving party under Rule 56 is thus no more "abstract" than the choice to reverse because of such error with respect to the elements of a tort claim. Indeed, given that the issue of the moving party's burden under Rule 56 was the

On these facts, there is simply no question that Celotex failed to discharge its initial burden of production. Having chosen to base its motion on the argument that there was no evidence in the record to support plaintiff's claim. Celotex was not free to ignore supporting evidence that the record clearly contained. Rather, Celotex was required, as an initial matter, to attack the adequacy of this evidence. Celotex' failure to fulfill this simple requirement constituted a failure to discharge its initial burden of production under Rule 56, and thereby rendered summary judgment improper.[6]

[477 US 337]

This case is indistinguishable from Adickes. Here, as there, the defendant moved for summary judgment on the ground that the record contained no evidence to support an essential element of the plaintiff's responded by drawing the court's attention to evidence that was already in the record and that had been ignored by the moving party. Consequently, here, as there, summary judgment should be denied on the ground that the moving party failed to satisfy its initial burden of production.[7]

Justice Stevens, dissenting.

As the Court points out, ante, at 319-320, 91 L Ed 2d, at 271-272, the petitioner's motion for summary judgment was based on the proposition that respondent could not prevail unless she proved that her deceased husband had been exposed to petitioner's products "within the jurisdictional limits" of the District of Columbia.[1]

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produce additional evidence showing the existence of a genuine issue for trial as provided in Rule 569e), or (3) submit an affi-

davit explaining why further discovery is necessary as provided in Rule 56(f). See 10A Wright, 2727, pp 138-143. Summary judgment should be granted if the nonmoving party fails to respond in one or more of these ways, or if, after the nonmoving party responds, the court determines that the moving party has met its ultimate burden of persuading the court that there is no genuine issue of material fact for trial. See, e.g., First National Bank of Arizona v Cities Service Co.. 391 US 253, 289, 20 L Ed 2d 569, 88 S Ct 1575 (1968).

4. Justice Stevens asserts that the District Court granted summary judgment on the ground that the plaintiff has failed to show exposure in the District Columbia. He contends that the judgment of the Court of Appeals reversing the District Court's judgment should be affirmed on the "narrow ground" that it was "palpably erroneous" to grant summary judgment on this basis. Post, at 339. 91 L Ed 2d, at 284 (dissenting). The Court replies basis of the Court of Appeals decision, the question upon which certiorari was granted, and the issue briefed by the parties and argued to the Court, it would seem to be the preferable ground for deciding the case.

5. Celotex apparently withdrew this motion because, contrary to the asssertion made in the first summmary judgment motion, its second set of interrogatories had not been served on the plaintiff.

6. If the plaintiff had answered Celotex' second set of interrogatories with the evidence in here response to the first summary judgment motion, and Celotex had ignored those interrogatories and based its second summary judgment motion on the first set of interrogatories only, Celotex obviously could not claim to have discharged its Rule 56 burden of production. This result should not be different simply because the evidence plaintiff relied upon to support her claim was acquired by Celotex other that in plaintiff's answers to interrogatories.

7. Although Justice White agrees that "if [plaintiff] has named a witness to support her claim, summary judgment should

Respondent made an adequate showing - albeit possibly not in admissible form[2] - that her husbandhad been exposed to petitioner's product in Illinois.[3] Although the basis of the motion and the argument had been the lack of exposure in the district of Columbia, the District Court stated at the end of augment: "The Court will grant the defendant Celotex's motion for summary judgment there being no showing that the plaintiff was exposed to the defendant Celotex's product in the District of Columbia or elsewhere within the statutory period." App 217 (emphasis added). The District Court offered no additional explanation and no written opinion. The Court of Appeals reversed on the basis that Celotex had not met its burden; the court noted the incongruity of the District Court's opinion in the context of the motion and argument, but did not rest on that basis because of the "or elsewhere" language.[4]

Taken in the context of the motion for summary judgment on the basis of no exposure in the District

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not be granted without Celotex somehow showing that the named witness' possible testimony raise no genuine issue of material fact," he would remand " [b]ecause the Court of Appeals found it unnecessary to address this aspect of the case." Ante, at 328-329, 91 L Ed 2d, at 277 (concurring). However, Celotex has admitted that plaintiff had disclosed her intent to call Mr. Hoff as a witness at trial before Celotex filed its second motion for summary judgment. Tr of Oral Arg 6-7 . Under the circumstances, then, remanding is a waste of time.

of Columbia, the [477 US 339]

District Court's decision to grant summary judgment was palpably erroneous. The court's bench reference to "or elsewhere" neither validated that decision nor raised the complex question addressed by this Court today. In light of the District Court's plain error, therefore, it is perfectly clear that, even after this Court's abstract exercise in Rule construction, we should nonetheless affirm the reversal of summary judgment on that narrow ground.[5]

I respectfully dissent.

1. See Motion of Defendant Celotex Corporation for Summary Judgment, App 170 ("Defendant Celotex Corporation, pursuant to Rule 56(b) of the Federal Rules of Civil Procedure moves this Court for an Order granting Summary Judgment on the ground that plaintiff has failed to produce evidence that any product designed, manufactured or distributed by Celotex Corporation was the proximate cause of the injuries alleged *within the jurisdictional limits of this Court")* (emphasis added); Memorandum of Points and Authorities in Support of Motion of Defendant Celotex Corporation for Summary Judgment, id., at 175 (Plaintiff "must demonstrate some link between a Celotex Corporation product claimed to be the cause of the decedent's illness and the decedent himself. The record is totally devoid of any such *evidence within the jurisdictional confines of this Court")* (emphasis added); ***Transcript of Argument in Support of Motion of Defendant Celotex Corporation for Summary Judgment, id., at 211 ("Our position is . . . there has been no product identification of any Celotex products . . . that have been used in the District of Columbia to which the decedent was exposed") (emphasis added)***

2. But cf. ante, at 324, 91 Ed 2d, at 274 (We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment").

3. See App 160 (letter from Aetna Life Insurance Co.) (referring to the "asbestos that Mr. Catrett came into contact with while working for Anning-Johnson Company" and noting that the "manufacture of this product" was purchased by Celotex); id., at 162 (letter from Anning-Johnson Co.) confirming that Catrett worked for the company and supervised the installation of asbestos produced by the company that Celotex ultimately purchased); id., at 164, 164c (deposition of Catrett) description of his work with asbestos "in Chicago").

4. See Catrett v John-Manville Sales Corp, 756 E2d 181, 185, n 14 (1985) ("[T]he discussion at the time the motion was granted actually spoke to venue. It was only the phrase 'or elsewhere,' appearing with no prior discussion, in the judge's oral ruling at the close of argument that made the grant of summary judgment even conceivably proper").

5. Cf. n 2, supra. The Court's statement that the case should be remanded because the Court of Appeals has a "superior knowledge of local law," ante, at 327, 91 L Ed 2d, at 276, is bewildering because there is no question of local law to be decided. Cf. Bishop b Wood, 426 Us 341, 345-347, 48 L Ed 2d 684, 96 S Ct 2074(1976).

The Court's decision to remand when a sufficient ground for affirmance is available does reveal, however, the Court's increasing tendency to adopt a presumption of reversal. See, e.g. New York b P.J. Video,Inc., 475 US 868, 884, 89 L Ed 871, 106 S. Ct 1610 (1986)(Marshall, J., dissenting); Icicle Seafood's, Inc. v Worthington, 475 US 709, 715, 89 L Ed 2d 739, 106 S Ct 1527 (1986) Stevens, J., dissenting); City of Los Angeles b Heller, 475 US 796, 800, 89 L Ed 2d 806, 106 S Ct 1571 (1986) (Stevens J., dissenting); Pennsylvania b Goldhammer, 474 US 28, 31, 88 L Ed 2d 183, 106 S Ct 353 (1986) (Stevens, J., dissenting). As a matter of efficient judicial administration and of respect for the sate and federal courts, I believe the presumption should be precisely the opposite.

appendix 64

TWIN CITY CONSTRUCTION COMPANY OF FARGO N. D.,
Respondent,

v.

ITT INDUSTRIAL CREDIT COMPANY, Appellant.
No. C4-84-1113.

Court of Appeals of Minnesota.
Dec. 11, 1984.

Contractor commenced suit against lender, claiming that lender was required to advance final payment due under construction contract under theories of express and implied contract, third-party beneficiary, and equitable principle of unjust enrichment. The District Court, Ramsey County, Hyan Segell, J., entered summary judgment in favor of contractor, and lender appealed. The Court of Appeals, Wozniak, J., held that: (1) lender was unjustly enriched by its refusal to make final payment under construction contract after completion of work by contractor, and (2) contractor was entitled to recover from lender final payment due as third-party beneficiary of loan agreement between owner and lender.

Affirmed.

1. Judgment 181(8)

When contract terms are not patently ambiguous, summary judgment in contractual dispute is appropriate.

2. Contracts 176(1)

Where intent of parties my be determined entirely from writing, construction of contract is for court.

3. Contracts 187(1)

Lender, regardless of disclaimer in loan agreement, intended to benefit contractor as third-party beneficiary of loan agreement between owner and lender in view of lender's insistence that contractor vacate its enforceable mechanic's lien in amount of $600,000 and subordinate its interest in of $650,000 during pendency of construction as clear preconditions to commitment of lender's funds for completion of construction project, in return for which lender agreed that it would make progress payments as work on project progressed.

4. Implied and Constructive Contracts 3

Lender was unjustly enriched by its refusal to make final payment under construction contract after completion of work by contractor.

5. Contracts 187(1)

After substantially completing construction project, contractor was entitled to recover from lender final payment due as third-party beneficiary of loan agreement between owner and lender.

Syllabus by the Court

1. After substantially completing construction project, contractor was entitled to recover from lender final payment due as third party beneficiary of the loan agreement between owner and lender.

2. In contracting with owner, lender intended to benefit contractor, despite contrary disclaimer in loan agreement.

3. If lender were allowed to keep final payment, unjust enrichment would result.

Ronald H. McLean, Tenneson, Serkland, Lundberg, Erickson & Marcil, Ltd., Fargo N. D., for respondent.

Brian Leonard, O'Neil, Burke & O'Neil, St. Paul, for appellant.

Heard, considered, and decided by LESLIEee, P.J., and LANSING and WOZNIAK, JJ.

OPINION

WOZNIAK, Judge

This is an appeal from a summary judgment, granting Twin City Construction Company final payment due from lender, ITT Industrial Credit Company, based on principles of third party beneficiary and unjust enrichment. ITT claims Twin City is not a third party beneficiary of the loan agreement and, further, that it has not been unjustly enriched. We affirm.

FACTS

Twin City contracted with Bridge Street Partnership for the construction of a Holiday Inn in New Ulm, Minnesota, in June 1979.

Constriction began immediately, but halted in November after Twin City had completed $600,000 work of work, and Bridge Street had failed to make progress payments. Twin City then perfected a mechanic's lien for the full amount.

Bridge Street sought a resume loan from ITT in order to complete the Holiday Inn.

As part of its bargain with Bridge Street, ITT demanded the release of the mechanic's lien. Further, it required Twin City to subordinate its interest in the sum of $650,000 during the pendency of the construction. twin City also agreed to complete the Holiday Inn project despite and default by Bridge Street of any payments due Twin City. Finally, it agreed that it would not be entitled to any lien rights on its own behalf or on behalf of any subcontractors or materialmen. Essentially, Twin City was to complete the construction project without any recourse whatsoever against the Holiday Inn project. A subordination agreement detailing these promises was signed by Twin City and Bridge Street. Having secured these concessions from Twin City through Bridge Street, ITT finalized the loan of #$3,450,000 in a written agreement dated August 7, 1980. In the agreement, ITT committed $2,900,00 specifically for construction costs to complete the Holiday Inn, which it was to pay directly to Twin City. In addition, ITT took an assignment of the original construction agreement between Bridge Street and Twin City. Finally, a disclaimer was written into the agreement which reads: "No third paryt is entitled to rely on any provisions in this agreement."

Twin City resumed construction on August 15, 1980. During the period of construction, ITT made progress payments directly to Twin City upon Bridge Street's approval.

Each payment was made after request by Twin City, by the final request of $34,000, made on November 13, 1981, was not honored. Twin City had completed all the steps necessary to receive the final funds. ITT refused to make the final payment, claiming Bridge Street was in default of the loan agreement. The request for final payment was prior

in time to the default, which occurred on March 10, 1982.

Twin City commenced suit, claiming that ITT was required to advance the remaining $34,000 under the theories of express and implied contract, third party beneficiary, and the equitable principle of unjust enrichment.

The trial court granted Twin City's motion for summary judgment, based on theories of third party beneficiary and unjust enrichment. ITT appeals.

ISSUE

Was Twin City entitled to judgment as a matter of law?

A. As a third party beneficiary?

B. Under the theory of unjust enrichment?

ANALYSIS

Under Minnesota procedure, summary judgment is proper when:

[T}he pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitle to judgment as a matter of law.

Min.R. Civ.P 56.03. Viewing the facts from the light most favorable to the losing party, the prevailing party must show there is clearly no genuine issue of material fact. *Rients v. International Harvester Co., 346 N.W. 2d 359 (Minn.Ct,App.1984).*

[1,2] When contract terms are not patently ambiguous, summary judgment is appropriate. *Matter of Turners Crossroads Development Co., 277 N.W. 2d 364 (Minn.1979).* **Furthermore, where the in-**

tent of the parties may be determined entirely from the writing, the construction of the contract is for the court. *Id.*

Here, the dispute is over the legal effect of the loan agreement between ITT and Bridge Street. The terms of the contract are not ambiguous and not extrinsic evidence is necessary to interpret it. Summary judgment was appropriate.

A. THIRD PARTY BENEFICIARY

A third party beneficiary is one to whom the promisee owes or is believed to owe a duty which is discharged by the promisors performance,

and the contractual with the third pary beneficiary acquires is to enforce a promise made for his benefit which he otherwise would not be able to enforce.

Crow & Crow, Inc. v. St Paul-Mercury Indemnity Co., 247 Minn,426, 428-429, 77 N. W.2d 429, 431 (1956).

The Minnesota Supreme Court recently set forth the criteria for the recognition of third party beneficiary rights in Cretex Companies,Inc v. Construction Leaders, Inc., 342 N.W. 2d 135 (Minn,1984).

The Cretex court adopted the intended beneficiary approach of the Restatement (Second) of Contracts 302(1979). It provides that a third party intended beneficiary can enforce a contract if it is appropriate and either the duty owed or the intent to benefit test is met. Id. at129, Contrary to ITT's contention, it is not necessary to satisfy both test.

The duty-owed test is met if the promisor's performance under the contract discharges a duty otherwise owed the third party by promisee. The intent to benefit test is met if the contract expresses some intent by the parties to benefit the third party through contractual performance.

Duty-Owed

In the instant case, Twin City agreed to construct a Holiday Inn for Bridge Street. The duty owed by Bridge Street to Twin City was the obligation to pay for the Holiday Inn. That duty was assumed by ITT when it committed itself to the construction loan. Habin assumed the obligation, it proceed to discharge the duty owed by Bridge Street by paying Twin City the progress payments as the work progressed. Thus, the promisor's (ITT) performance under the contact discharged a duty owed the third party (Twin City) by the promisee (Bridge Street); th duty-owed test was met.

Intent to Benefit

ITT argues that the intent to benefit test cannot be satisfied in light of the disclaimer, a clear expression of an intent not to benefit any third party.

In determing whether ITT intended to benefit Twin City by its loan agreement with Bridge Street, it is necessary to read the contract in light of all the circumstances at the time of contracting. The pertinent inquiry in "to who is performance to be rendered?" Buchman Plumbing Co., Inc. v. Regents of the University of Minnesota, 298 Minn, 328, 335, 215 N. W. 2d 479, 484 (Minn.1974).

This court may examine the contract language to ascertain the real exchange of promises. Trans-Bay Engineers and Builders, Inc. v. Hills, 551 F.2d 370 (D.C. Cir. 1976).

[3] Considering all the circumstances and all the documents, it is clear that Twin City is an intended beneficiary of the loan agreement. ITT insisted that Twin City vacate its enforceable lien in the amount of $600,000, and further required that it subordinate its interest in the sum of $650,000 during the tendency of the construction. These were clear preconditions by ITT to the commitment of its funds for the completion of the Holiday Inn. In return for these commitments by Twin City, ITT agreed that it would, and did, inn fact, make progress payments as the work on the Holiday Inn progressed. It did this until a final sum of $34,000 in retainage remained to be paid. We conclude that ITT regardless of the disclaimer, intended to benefit Twin City.

The Default

ITT claims, however, that even if Twin City is a third party beneficiary under the contract, Twin City is barred from recovery because Bridge Street defaulted.

It is true that as a third party beneficiary, Twin City was not entitled to payment once Bridge Street defaulted. Trans-Bay, 551 F.2d at 379,380. However, Bridge Street was not in default until it failed to make an interest payment due on March 10, 1982. Default on a loan agreement does not constitute a bar to recovery by a third party beneficiary when that default occurs after substantial completion of the project.

ITT was informed in November 1981 that Twin City had substantially completed performance under the contract. Default was noted five months later, in March 1982. Thus, at the time of substantial completion of the project, Bridge Street was not in default and Twin City was entitled to recovery.

B. UNJUST ENRICHMENT

If ITT were permitted to benefit from the work performed by Twin City and also to avoid paying out the complete funds relied upon by Twin City for its performance, it would be unjustly enriched. As the Trans-Bay court pointed out, it would be inequitable to permit the financier of a construction project to retain funds committed to a project after completion of the work by the contractor. Id. at 382. [4] As part of the consideration for the project, Twin City had to release its mechanic's lien and waive any other recourse against the project for construction costs not covered by the funds promised by ITT. Such a requirement, written at the insistence of ITT, was doe for ITT's benefit, and as a practical matter, it is unlikely that the loan would have been granted without that condition. Under these facts, recovery is proper to prevent ITT from unjustly benefiting from the work completed by Twin City.

DECISION

[5] Whether viewed from the standpoint of a third party beneficiary or from the standpoint of unjust enrichment, Twin City is clearly entitle to recover in this factual setting. After substantially completing a construction project, contractor was entitled to recover from lender final payment due as a third

party beneficiary of the loan agreement between owner and lender. The parties to the loan agreement intended to benefit contractor despite the disclaimer prohibiting a third party reliance on the agreement.

Affirmed.

Rule 56. Summary Judgment

(a) FOR CLAIMANT. A party seeking to recover upon a claim, conterclaim, or cros-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motions for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) FOR DEFENDING PARTY. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing mat serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) CASE NOT FULLY ADJUDICATED ON MOTION. If on motion under this rule judgment is not rendered upon the whole case or for all the

relief asked an trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall therupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) FORM OF AFFIDAVITS; FURTHER TESTIMONY; DEFENSE REQUIRED. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) WHEN AFFIDAVITS ARE UNAVAILABLE. Should it appear from the affidavits off a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to had or may make such other order as is just.

(g) AFFIDAVITS MADE IN BAD FAITH. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expense which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(As amended Dec. 27, 1946, eff, Mar.19, 1948: Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987.)

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
ATLANTA, GEORGIA

Appellant's Petition for Rehearing

ERNEST McDUFFIE, III,
Individually, and doing
business as D & M CONTRACTING
COMPANY,

Case No. 97-2263

D. C. Docket No. 95-012110-CIV-J-20B
Plaintiff -- Appellant, Pro se

v.

FIRST UNION NATIONAL BANK OF
FLORIDA,

Defendant -- Appellee.

Appellant's Petition for Rehearing

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APPELLANT'S PETITION for REHEARING

Appellant petitions the court for rehearing of the decision made September 19, 1997, for summary judgment on Case No. 97-2263, D. C. Docket No. 95-01210- CIV-J-20B, by the United States Court of Appeals, Eleventh Circuit. Appellant submits 13 affidavits in support of this petition for rehearing of the facts.

Come now the Appellant, 'pro se' submitting Appeal brief to the United States Eleventh Circuit Court of Appeals, in support of Notice of Appeal filed February 28, 1997, from an Order issued February 4, 1997, by the United States District Court of the Middle District of Florida and now from an order issued September 19, 1997, by the United states court of Appeals for the Eleventh Circuit. Jurisdiction is specifically conferred on the Court of Appeals by 28 U. S. C. 1291, Public Law 88-352, Title VI of the 1964, as amended: District court by 42 U. S. C. 2000d-1.

The issues presented for review are whether:

(a) Appellant filed lawsuit against First Union bank alleging violation of Title VII, 42. U. S. C. 2000d.

(b) Appellant has not made out a prima facie case of discrimination.

Facts relevant to the issues presented are; this discrimination case was brought against First Union National Bank of Florida, pursuant to Public Law 88-352 Title VI of the Civil Rights Act of 1964, as amended, Code of Federal Regulations (CFR) 13 Part

101 - 318; (CFR) 15 Part 8 -- 299; (CFR) 24 Part 0 -- 146;(CFR) 24 Part 500- 600; (CFR) 49 Part 1 --99; (CFR) 48 Part 52 -- 99; (CFR) 12 Part 25 and 32; (CFR) 29 Part 0 -- 99 and Part 100 -- 199.

Title VI - Nondiscrimination in Federally assisted programs, Sec. 601. states no person in the United States shall, on the ground of race, color or national origin, be exclude from participation in, be denied the benefits of or be subjected to discrimination under any program or activity receiving federal financial assistance.

As cited in the Grove City College v. Terrel H. Bell, 465 US 55,79 L,Ed.2d 516 No. 82-792, argued Nov. 29, 1983; decided Feb. 28, 1984, a "recipient" is defined in 34 CFR, 106.2(h) 1983 to include:

> "[A]ny public or private agency, institution or organization or other entity or any person, to whom federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance."

It Further states:

> "The Title IX was patterned after Title VI of the Civil Rights Act of 1964..... Except for the substitution of the word "sex" in Title IX to re place the words, "race, color, or national origin in Title VI, and for the limitation of Title IX to "education" programs or activities, the two statutes use identical language to describe their scope."

The case Association of Mexican American Educators v. The State of California Commission on Teacher Credentialing, No. C-92-3874 WHO, U.S. District Court, N. D. California, Aug. 25, 1993., states Plaintiffs under Title VI of Civil Rights Act, which prohibits use of federal funds to subsidize racial discrimination, may maintain private right of action based on administrative regulations promulgated pursuant to Title VI; Supreme court has held that those regulations are valid and that they further congressional purpose of withholding federal funds from discriminatory practices. Civil Rights Act of 1964 , 601, as amended, 42 USCA 2000d.

SUMMARY OF ARGUMENT

The complaint of discrimination against the Appellant by the Appellee was filed under Title VI not Title VII, as the Courts decision of September 19, 1997, indicated.

Appellant contends that as per order of the District Court dated February 4, 1997, Appellant was unable to effect the necessary documents in a timely fashion as required by the District Court due to the lack of financial assistance to afford proper legal counsel. Appellant assert that having acted pro se' without the advice and affordability of counsel lends itself to omissions and mistakes that otherwise would not arise.

The attached affidavits of Debra A. Anderson, Reverend Andrew B. Coleman, Jr., Rosa M. Jones-Carter, Michael Green, Andre' W. McBride, Marvel M. McKinney, Nathaniel P. Richardson, Ernest Taylor, Charles Wilcox, Ernest McDuffie,III,

Ernest Kevin McDuffie, Magadelene W. McDuffie, and Melanese D. Way, along with Appellant's brief filed June 18, 1997, and Exhibits 1 - 35 supports a prima facie case of discrimination.

WHEREFORE, Appellant prays the court's indulgence and further consideration in accepting the thirteen (13) affidavits and required documents, necessary to establish and effect a prima facie case of discrimination, and that the court grant such relief as may be appropriate, including damages in excess of $10,000,000.00, costs, forfeiture of profit and overhead, recovery of double the amount of profit and overhead, and punitive damages on contractual opportunities from 1987 through 1996. Appellant demands a trial by jury.

Ernest McDuffie, III, pro se
8803 Yeoman Drive
Jacksonville, Florida
904-765-3149

Certificate of Service

I hereby certify that a copy of this document was delivered U. S. mail on Michael Freed, E. Lanny Russell, John F. MacLennan of Smith Hulsey & Busey, 1800 First Union Bank Tower, 225 Water Street, Jacksonville, Florida , 32202, this 22nd day of October , 1997.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
56 Forsyth Street, NW
Atlanta, Georgia 30303

ERNEST McDUFFIE, III,
Individual, and doing Business
as D & M Contracting Company
8803 Yeoman Drive
Jacksonville, Florida 32208
Appellant, Pro se

CASE NO.: 97-2263
DC DKT NO: 95-01210 CIV-J-20B

v.
FIRST UNION NATIONAL BANK OF FLORIDA
225 Water St., 1800 Union Tower
Jacksonville, Florida 32201

Appellee.

AFFIDAVIT OF DEBRA A. ANDERSON

STATE OF FLORIDA
COUNTY OF DUVAL

BEFORE ME, the undersigned Authority, this date personally appeared Debra A. Anderson who, being by me First duly sworn deposed and says:

1. My name is Debra A. Anderson, my address is 4724 Clyde Drive, Jacksonville, Florida, and I have personal knowledge of the facts stated herein; and, I know them to be true.

2. During 1990 - 1992, I was the Assistant Project Manager on the St. Andrew project, which is the subject of this action.

3. First Union National Bank of Florida required a Bid, Payment, and Performance Bond for St. Andrew. When on similar and higher cost projects built by white contractors no such demands were made. For example: three bonds were required for the construction of St. Andrew Missionary Baptist Church at $456,000.00, when no bonds were required on similar and larger projects financed by First Union National Bank of Florida. (See exhibit 35, pp. 9-13, 215-218). According to records filed with the clerk of the courts, First Union National Bank of Florida required No Bonds from White contractors: The John Stokes Company Inc. of 6821 Southpoint Drive North, Jacksonville, Florida 32216 for the construction of First Timothy Baptist Church a $750,000.00 facility located at 12103 Biscayne Boulevard, Jacksonville, Florida (See Exhibit 35, pp. 27-33). Also, on Saint Paul African Methodist Episcopal Church located 6910 New Kings Road, Jacksonville, Florida built by White contractor certified Benchmark Companies Inc. 7901 Baymeadows Way, Jacksonville, Florida 32256 for $2,100,000.00 No Bonds was required, (See Exhibit 35, pp. 22-26,213,214).

4. First Union National Bank of Florida called for default based on faulty and misleading

information and disregarding the evidence from governmental approving agencies and other tactics used by First Union National Bank of Florida. For example: First Union took the word of Wayne Kelly of M.V. Cummings. (See exhibit 35, pp. 36A-B) as the basis for their default when the work they cited as code violations were not violations at all (see Ross Disp. P 49). Additionally, the governmental inspection agency who has the final word on such matters had approved the work and supported the outside inspection by Ross,(see Exhibit 35, p. 36A-B) on both the First Timothy Baptist Church and St. Paul AME. The inspection of the governmental entity, namely, the department of Public work, zoning and inspection Division were accepted (see Exhibit 35 P.36).

5. First Union National Bank of Florida tactics of attacking the Bonding capability of African Americans is not new; however, it is a sure way to impede a minority firm's growth and development by limiting their ability to compete In the open market as a prime contractor. (See Exhibit 35, pp 198-202 D.J. Miller and Associates, Disparity study city of Jacksonville) as a result of the negative impact of withholding payments.

6. The Electrical Contractor, Nathaniel Richardson and Charles Wilcox, the Heating /Air Conditioning Contractor were African-American. The utility and plumbing contractors were white. The workforce was 95% African-Americans living in the local community around the St. Andrew Missionary Baptist Church, with a predominately African-American membership.

7. There were two sets of plans. Only, one set had been approved by First Union National Bank

of Florida and the Borrower. The set dated 4/1/89 was used to price, bid, and bond the project. The set dated 8/28/90, containing numerous changes (amended) that had not been approved y the Borrower nor First Union National Bank of Florida, according to their commitment letter and Loan Agreement be used,(see Exhibit 35, pp. 203-207). The vast difference in the two sets of plans and the demands from First Union National Bank of Florida was unjustified and goes against a standard of architect's care prescribed by Florida Statue 481. 221(5).

8. Further, First Union National Bank of Florida holds that funds were withheld because "the work for which the funds were requested was not done according to the approved plans and specifications" (see Dunn AFF. At. 14; Munger AFF. 15). However, payments to the utility and plumbing contractors were made; and, they were using the same plans as D&M Contracting and the electrical and H.V.A.C. Contractors, (see Exhibit 35, pp. 67A-67-F). First Union National Bank of Florida continue to withhold construction funds, covering payments for African-American contractors even though request were approved by Architect and St. Andrew. For example: Payments for the plumbing and utility work performed by White contractor's Classic Plumbing and water and sewer utility both were paid while payment for electrical and heating/air conditioning contractors, Charter Electric and Bill Refrigeration; both African-American were held (see Richardson Disp. pp 91-94).

9. First Union National Bank of Florida was unjustly enriched by not paying the final progress payment. First Union National Bank of Florida benefited from the completion of the church and not

paying the remaining balance of $8,811.40. To be allowed to discriminate, destroy the economic opportunities, and retain funds due is more than unjust enrichment. It borders on piracy. The facility has been in continuous use since November 17, 1991.

10. First Union National Bank of Florida is well known in the African-American community for their unfavorable practices (see Exhibit 35, pp. 153-157, 160, 182-190). The attack was also felt by the Heating/Air Conditioning Contractor, who closed down following the treatment by First Union Bank of Florida on the St. Andrew project and the Electrical Contractor must go out -of-town in order to have work to sustain his family. First Union National Bank of Florida's history in dealing with minority issues speaks to the far reaching effect of the organization corporate business practices. Where there is smoke there is fire. Discrimination cases filed in Winter Garden, Florida, 1990 protest in Orlando, Florida and Charlotte, First Union National Bank of Florida corporate headquarters are indicative of the lack of sensitivity to Blacks and minority communities (see Exhibit 19 page 48).

12. St. Andrew is still standing with no changes made to the electrical system, the air conditioning units or the constructed buildings. According to the owners of the church, everything is working in a satisfactory condition.

13. The normal day to day business practices implored by First Union National Bank of Florida have a disparate impact on minorities. Federal Funds whether through Small Business Loans, Contractual Relationship opportunities, Low Income Home Programs or reinvesting in low-income communities should not be

used to "Subsidize Racial Discrimination." (See Association of MexicanAmerican Educators v. The State of California Commission on Teacher Credentialing No. C-92-3874 WHO. U.S. District Court. N.O. California Aug. 25 1993).

_____
Debra A. Anderson

Sworn to and subscribed before me, this 21st day of October, 1997 by Debra A. Anderson, who is personally (known to me) or who produced _____ as identification.

Print name Kenya Nelson Notary Public, State and County Florida Duval

Commission No. CC399088

My Commission Expires. June 29, 1998

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
56 Forsyth Street, NW
Atlanta, Georgia 30303

ERNEST McDUFFIE, III,
Individual , and doing Business
as D & M Contracting Company
8803 Yeoman Drive
Jacksonville, Florida 32208
Appellant, Pro se

CASE NO.: 97-2263
DC DKT NO: 95-01210 CIV-J-20B

v.

FIRST UNION NATIONAL BANK OF FLORIDA
225 Water St., 1800 Union Tower
Jacksonville, Florida 32201

Appellee.

AFFIDAVIT OF ROSA M. JONES CARTER

STATE OF FLORIDA
COUNTY OF DUVAL

Before me, the undersigned authority, this date personally appeared Rosa M. Jones Carter who, being by me first duly sworn deposed and says:

1. My name is Rosa M. Jones Carter, I have personal knowledge of the facts stated here in and I know them to be true (in 1991). First Union National Bank of Florida intentional discriminated against Ernest McDuffie III, the owner of D&M Contracting Company by treating him differently in the administration of the St. Andrew Construction contract, thereby violating his civil rights.

First Union Bank of Florida required a bid, payment and performance bond for St. Andrew when on similar and higher cost projects built by white contractors no such demand was made. Example #1, three bonds were required for the construction of St. Andrew Missionary Baptist Church at $456,000.00 when no bonds were required on similar and larger projects financed by First Union National Bank of Florida (see exhibit 35, pp,9-13, 215-218), according to records filed with the Clerk of the Courts, First Union National Bank of Florida required no bond from white contractor, John Stokes Company, Inc., 6821 Southpoint Drive North, Jacksonville, Florida, 32216, for the construction of the First Timothy Baptist Church a project estimated at $750,000.00, facility located at 12103 Bsicayne Boulevard, Jacksonville, Florida, (see exhibit 35, pp. 27-33). Example #2, St Paul African Methodist Episcopal Church located at 6910 New King Road, Jacksonville, Florida, built by a white contractor Certified Benchmark Companies, Inc., 7901 Baymeadows Way, Jacksonville, Florida 32256, project estimated at $2,1000,000.000 no bond was required (see exhibit 35, pp. 22-36).

First Union National Bank of Florida calling for default based on faulty and misleading information and disregarding the evidence from governmental approv-

ing agency are other tactics used by First Union National Bank of Florida. Example #3 First Union took the word of Wayne Kelly of M. V. Cummings, (see exhibit 35, pp. 36a-b), as the basis for their default when the work they cited as a code violation were not violations (see Ross /Disp. p. 49). Additionally, the governmental inspection agency who has the final word on such matters had approved the work and supported the outside inspection by Ross. (see exhibit 35 p. 36a-b). The First Timothy Baptist Church and St. Paul A. M. E. Church were inspected by the governmental entity namely The Department of Public Work, Zoning and Inspection Division were accepted, (see exhibit 35, p.36).

First Union National Bank of Florida tactic of attaching the bonding capability of an African-American is not new, however, it is a sure way to impede an African-American firm's growth and development by limiting their ability to compete in the open market as a prime contractor, (see exhibit 35, pp. 198-202, D. J. Miller & Associates, Disparity Study City of Jacksonville), as a result of the negative impact of withholding payments Ernest McDuffie, III was forced to seek other sources to complete the St. Andrew Missionary Baptist Church project, he accomplished this by securing a loan with the Small Business Administration, of which First Union National Bank of Florida is co-owner.

The work force of the project was 95% African-Americans living in the local community surrounding the St. Andrew Missionary Baptist Church, with a predominantly African-American membership. Nathaniel Richardson, electrical contractor, Charles Wilcox, HVAC contractor, and Rosa M. Jones Car-

ter, masonry contractor were all African-Americans. The utility and plumbing contractors were white.

There were two sets of plans submitted for the project, one set dated 4/1/89 had been approved by First Union National Bank of Florida and the Borrower. This set was used to price, bid and bond the project. The second set dated 8/28/90 which contained numerous changes (amended) had not been approved by the Borrower not First Union National Bank of Florida according to their commitment letter and loan agreement (see exhibit 35, pp. 203-207), the vast difference between the two sets of plans and the demands from First Union National Bank of Florida were unjustified and goes against a standard of architects prescribed by Florida Statute 481.221(s).

First Union National Bank of Florida holds to the statement that funds were withheld because "the work for which the funds were requested was not done according to the approved plans and specifications (see Dunn Aff.14: Munger Aff.15), however, payments were made to the utility and plumbing contractors with which were using the same set of plans as D&M Contracting Company, and the electrical, hvac, and masonry contractors (see exhibit 35, pp. 67a-67f). First Union National Bank of Florida continued to withhold construction funds concerning African-American contractors even though request for payment were approved by the architect and St. Andrew Missionary Baptist Church. Payments for the plumbing and utility work performed by white contractor's Classic plumbing and Water and Sewer utility were both paid, while payments for electrical, hvac, and masonry contractors all of which are African-Americans were held.

Ernest McDuffie, III the owner of D&M Contracting Company and his subcontractors submitted change orders and amended contracts to comply with the altered plans and specifications. Those submitted by the African-Americans contractors were held rejected and were not paid, and those submitted by the plumbing and utility contractors of which were white contractors were paid.

The impact of First Union National Bank of Florida actions had a far reaching effect on more that Ernest McDuffie III, the owner of D&M Contracting Company. First Union National Bank of Florida undue tactics and results touched his subcontractors and the African-American community. Ernest McDuffie III had been named as the contractor of record for the Florida General Baptist Convention covering 750 churches representing approximately 500,000 people in 1990, (see exhibit 6, p. 21). The hope of employing and empowering a person through self was destroyed. D&M Contracting Company and its subcontractors would have been in position to create jobs, therefore helping to eliminate crime in our community and creating a better life for many people. The African-American contractors working on the St. Andrew Missionary Baptist Church project represented collectively approximately 50 individuals for whom they provided jobs. To review a list of completed projects performed by Ernest McDuffie II, owner of D&M Contracting Company including his subcontractors (see exhibit 6, p. 1-43).

First Union National Bank of Florida is well known in the African-American community for their unfa-

vorable practices (see exhibit 35, pp. 153-157, 160, 182-190). The attack strongly affected the hvac contractor who closed his business following the treatment by First Union National Bank of Florida on the St. Andrew Missionary Baptist Church project. As the masonry contractor we were not able to sustain my work force, therefore, we had to layoff employees and seek work as a consultant. First Union National Bank of Florida history in dealing with African-American issues speaks to the far reaching effect of the organizations corporate business practices, "where there is smoke there is fire." Discrimination cases filed in Winter Gardens, Florida and Charlotte, North Carolina, First Union National Bank of Florida corporate headquarters are indicative of the lack of sensitivity to African-Americans and minority communities (see exhibit 19, p. 48).

St. Andrew Missionary Baptist Church remains standing with no changes made to the electrical system, hvac units, masonry or structural building. According to the owners of the church everything is working in satisfactory condition.

The normal day to day business practices implored by First Union National Bank of Florida have a disparate impact on African-Americans and minorities. Federal funds whether through small business loans, contractual relationship opportunities, low income home programs or reinvesting in low-income communities should not be used to "subsidize racial discrimination (see Association of Mexican American Educators v. The State of California Commission on Teacher Credentialing No. C-92-3874 who U. S. District Court N. D. California Aug. 25, 1993).

How many other African-American small businesses and minority individuals that experienced the same unfair treating afforded Ernest McDuffie III, one may never know. However, the size of an organization should not make it above the law and beyond fair treatment to all.

_____

Rosa M. Jones Carter

Sworn to and subscribed before me this 20th day of October 1997. By Rosa M. Jones Carter, who is personally known to me or who produced driver's license as identification.

Print name Mariso V. Grossling Notary Public, State and County Florida Duval

Commission No. CC612730

My Commission Expires. January 12, 2001

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

ERNEST McDUFFIE, III,
8803 Yeoman Drive
Jacksonville, Florida 32208,
Appellant, Pro se

CASE NO.: 97-2263
DC DKT NO.: 95-01210 CIV-J-20B

v.

FIRST UNION NATIONAL BANK OF FLORIDA
225 Water St., 1800 First Union Tower
Jacksonville, Florida 32201
Appellee.

AFFIDAVIT OF ANDREW BROOKER COLEMAN, JR.

STATE OF FLORIDA
COUNTY OF DUVAL

BEFORE ME, the undersigned authority, this date personally appeared Andrew Brooker Coleman, Jr., who, being by me first duly sworn, deposes and says:

1. My name is Andrew Brooker Coleman, Jr. I have personal knowledge of the facts stated herein and I know them to be true.

2. During 1990 and currently , I serve as Pastor of St. Andrew Missionary Baptist Church which is the Owner of the church facility, which is the subject of this action.

3. A loan to construct the new church was obtained with the help of Raymon Day, an officer with First Union. The Bank after reviewing the contractors, who submitted bids, approved D & M Contracting Company to build the building. Prior approval of the Contractor, and bid, performance and payment bonds were required by the Bank before signing the loan documents.

4. Steve Lazar of Veenstra Rinaman Lazar, was hired by the Church to draw the plans for the project. The first set of plans drawn were too expensive, and there were some alterations made. The original plans, the first plans, could not be built within the budget, and he (Lazar) had to draw additional plans. There were some alterations made. It was submitted to the bank and the bank said it could be done.

5. The project moved along smoothly until a telephone conversation between Rob Dunn of First Union Bank and my architect Steve Lazar. Prior to that time, everything seemed to have been in order. I was sitting in the Rob Dunn's office in First Union Bank Building with Mr. McDuffie during the course of the conversation, Mr. Dunn called Mr. Lazar. At the end of the phone call, everything changed. It just seems from that moment on it's almost as if we had moved from one stage to another, one where the bank was helpful to one where we were in an adversarial position with the bank.

Mr. Dunn's relationship with the church and with the contractor, seemed to have been different.

6. The consulting engineer for Lazar, M. V. Cummings recommended a particular kind of air conditioning system that was really a system that was being discontinued. Only one person in town, handled that air conditioning system. It was far more expensive than what we needed or could afford. This system is what the original plan called for. A letter was written shortly afterwards by Wayne Kelly, which advised First Union that McDuffie was in default under the Contract because he had substantially deviated from approved plans and specifications for the Facility. I felt like the motivation behind the letter was unfair and suspicious, because of what was specified, a particular brand, a particular model, a discontinued model handled by only one company in Jacksonville. First Union notified Hartford, the bonding company of default by Mr. McDuffie, including in the default letter, that the electrical system installed was unsafe and violated codes. David Ross, an independent engineer from Orlando, Florida, came and reviewed the building for the conditions cited by Cummings, saying there was no reason to stop the project.

7. There seemed to be two standards being applied : one for black contractors and the other for white contractors, on the project. When the issue of not paving the parking lot because the soil was unsuitable, the blame was readily placed on Mr. McDuffie even though the architect was responsible for conducting soil borings, and had advised the Church that it could build on the property.

8. On several occasions, First Union withheld payments to D & M Contracting, even though they had been approved by the Church and Lazar.

I wrote letters to have the funds released.

9. As Pastor, I felt I should have been consulted before the Bank took action for default. The Bank's officer, Mr. Dunn took a paternalistic attitude towards the Church and D & M Contracting, even showing and saying he was surprised at the quality of the work My whole relationship with him was one where, he knew best. He knew best for us. In my eyes Rob Dunn was First Union. He was the only one I was dealing with, and his actions towards us seemed to be negative and discriminatory. I spoke with the Bank's President, Beth McCague for her to look into the Church's situation. Also the Florida Times Union interviewed me concerning the St. Andrew project.

10. Given the history of race relations in this city especially as it relates to black entrepreneurs in the construction arena, I believe there was a heavier burden placed on Mr. McDuffie than perhaps somebody else.

_____

Andrew Brooker Coleman, Jr.

Sworn to and subscribed before me, this 17th day of October, 1997, by Andrew Brooker Coleman, Jr., who is personally known to me or who produced _____ as identification.

Print Name Tracy M. Grier, Notary Public, State and County Florida , Duval
Commission No. CC483313
My Commission Expires: Jul. 24, 19999

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

ERNEST McDUFFIE, III,
8803 Yeoman Drive
Jacksonville, Florida 32208,
Appellant, Pro se

CASE NO.: 97-2263
DC DKT NO.: 95-01210 CIV-J-20B

v.
FIRST UNION NATIONAL BANK OF FLORIDA
225 Water St., 1800 First Union Tower
Jacksonville, Florida 32201
Appellee.

AFFIDAVIT OF MICHAEL GREEN

STATE OF FLORIDA
COUNTY OF DUVAL

BEFORE ME, the undersigned authority, this date personally appeared Michael Green, who, being by me first duly sworn, deposes and says:

1. My name is Michael Green. I live at 6870 Rhode Island Drive, Jacksonville, Florida, I

have personal knowledge of the facts stated herein and I know them to be true.

2. During 1990 through 1992, I was the drywall installer on the St. Andrew Missionary Baptist Church new construction project which is the subject of this action.

3. First Union National Bank of Florida required a Bid, Payment, and Performance Bond for St. Andrew. When on similar and higher cost projects built by white contractors no such demands were made. For example: three bonds were required for the construction of St. Andrew Missionary Baptist Church at $456,000.00, when no bonds were required on similar and larger projects financed by First Union National Bank of Florida. (See exhibit 35, pp. 9-13, 215-218). According to records filed with the clerk of the courts, First Union National Bank of Florida required No Bonds from White contractors: The John Stokes Company Inc. of 6821 Southpoint Drive North, Jacksonville, Florida 32216 for the construction of First Timothy Baptist Church a $750,000.00 facility located at 12103 Biscayne Boulevard, Jacksonville, Florida (See Exhibit 35, pp. 27-33). Also, on Saint Paul African Methodist Episcopal Church located 6910 New Kings Road, Jacksonville, Florida built by White contractor certified Benchmark Companies Inc. 7901 Baymeadows Way, Jacksonville, Florida 32256 for $2,100,000.00 No Bonds was required, (See Exhibit 35, pp. 22-26,213,214).

4. First Union National Bank of Florida called for default based on faulty and misleading information and disregarding the evidence from governmental approving agencies and other tactics used by First Union National Bank of Florida. For example: First Union took the word of Wayne Kelly of M.V. Cummings. (See

exhibit 35, pp. 36A-B) as the basis for their default when the work they cited as code violations were not violations at all (see Ross Disp. P 49). Additionally, the governmental inspection agency who has the final word on such matters had approved the work and supported the outside inspection by Ross,(see Exhibit 35, p. 36A-B) on both the First Timothy Baptist
Church and St . Paul AME. The inspection of the governmental entity, namely, the department of Public work, zoning and inspection Division were accepted (see Exhibit 35 P.36).

5. First Union National Bank of Florida tactics of attacking the Bonding capability of African Americans is not new; however, it is a sure way to impede a minority firm's growth and development by limiting their ability to compete In the open market as a prime contractor. (See Exhibit 35, pp 198-202 D.J. Miller and Associates, Disparity study city of Jacksonville) as a result of the negative impact of
withholding payments.

6. The Electrical Contractor, Nathaniel Richardson and Charles Wilcox, the Heating /Air Conditioning Contractor were African-American. The utility and plumbing contractors were white. The workforce was 95% African-Americans living in the local community around the St. Andrew Missionary Baptist Church, with a predominately African-American membership.

7. There were two sets of plans. Only, one set had been approved by First Union National Bank of Florida and the Borrower. The set dated 4/1/89 was used to price, bid, and bond the project. The set dated 8/28/90, containing numerous changes (amended) that had not been approved y the Borrower nor First Union National Bank of Florida, according to their commitment letter

and Loan Agreement be used,(see Exhibit 35, pp. 203-207). The vast difference in the two sets of plans and the demands from First Union National Bank of Florida were unjustified and goes against a standard of architect's care prescribed by Florida Statue 481. 221(5).

8. Further, First Union National Bank of Florida holds that funds were withheld because "the work for which the funds were requested was not done according to the approved plans and specifications" (see Dunn AFF. At. 14; Munger AFF. 15). However, payments to the utility and plumbing contractors were made; and, they were using the same plans as D&M Contracting and the electrical and H.V.A.C. Contractors, (see Exhibit 35, pp. 67A-67-F). First Union National Bank of Florida continue to withhold construction funds, covering payments for African-American contractors even though request were approved by Architect and St. Andrew. For example: Payments for the plumbing and utility work performed by White contractor's Classic Plumbing and water and sewer utility both were paid while payment for electrical and heating/air conditioning contractors, Charter Electric and Bill Refrigeration; both African-American were held (see Richardson Disp. pp 91-94).

9. First Union National Bank of Florida was unjustly enriched by not paying the final progress payment. First Union National Bank of Florida benefited from the completion of the church and not paying the remaining balance of $8,811.40. To be allowed to discriminate, destroy the economic opportunities, and retain funds due is more than unjust enrichment. It borders on piracy. The facility has been in continuous use since November 17, 1991.

10. First Union National Bank of Florida is well known in the African-American community for their unfavorable practices (see Exhibit 35, pp. 153-157, 160,

182-190). The attack was also felt by the Heating/Air Conditioning Contractor, who closed down following the treatment by First Union Bank of Florida on the St. Andrew project and the Electrical Contractor must go out - of-town in order to have work to sustain his family. First Union National Bank of Florida's history in dealing with minority issues speaks to the far reaching effect of the organization corporate business practices. Where there is smoke there is fire. Discrimination cases filed in Winter Garden, Florida, 1990 protest in Orlando, Florida and Charlotte, First Union National Bank of Florida corporate headquarters are indicative of the lack of sensitivity to Blacks and minority communities (see Exhibit 19 page 48).

11. St. Andrew is still standing with no changes made to the electrical system, the air conditioning units or the constructed buildings. According to the owners of the church, everything is working in a satisfactory condition.

_____

Michael Green

Sworn to and subscribed before me, this 21st day of October, 1997, by Michael Green, who is (personally known) to me or who produced _ as identification.
Print Name Kenya Nelson
Notary Public, State and County Florida , Duval
Commission No. CC399088
My Commission Expires: June 29, 1998

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

ERNEST McDUFFIE, III,
8803 Yeoman Drive
Jacksonville, Florida 32208,
Appellant, Pro se

CASE NO.: 97-2263
DC DKT NO.: 95-01210 CIV-J-20B

v.

FIRST UNION NATIONAL BANK OF FLORIDA
225 Water St., 1800 First Union Tower
Jacksonville, Florida 32201
Appellee.

AFFIDAVIT OF MAGADELENE W. MCDUFFIE

STATE OF FLORIDA
COUNTY OF Duval

BEFORE ME, the undersigned authority, this date personally appeared Magadelene W. McDuffie, who, being by me first duly sworn, deposes and says:

1. My name is Magadelene W. McDuffie. I have personal knowledge of he facts stated herein and I know them to be true.

2. During 1991, I help guarantee a S. B. A loan with Ernest McDuffie and Magadelene W. McDuffie for D & M Contracting to complete the St. Andrew Church project. The loan was given prior approved by the Small Business Administration. The loan was necessary due First Union withholding payment requests after the architect had approved them. The Church had to write a letter to get funds released. The way First Union officers administrated the construction contract and treated the subcontractors was demeaning and discriminatory. Payments for the underground utility and plumbing contractors
were signed off on and paid promptly. However, there was a hold up on payments for the air condition , electrical contractors and D & M Contracting. Request for changes recommended by white contractors were accepted and
praised. On the other hand, change requests were held.

3. The St. Andrew job was a source of income for numerous Black African-American small companies, their employees and families. The treatment by First Union unjustly harmed these individuals.

4. Even though the project was totally completed, the attack on the company's bonding capacity was fatal. Without adequate bonding strength, the company was unable to compete effectively for profitable work. First Union required more than a performance bond, but also bid and payment

bond. Which maybe company policy, but it was applied to haphazard. Sometimes it is required, sometimes it is not. It all depends of the bank officer.

5. The difficulty with First Union and its resulting effect greatly impacted the well-being of my daughter Tracia D. Wright, who is physically disabled. Prior to 1991, I was able to substantially provide for the welfare of my daughter. The problems with St. Andrew effected the entire family drastically.

_____

Magadelene W. McDuffie

Sworn to and subscribed before me, this 21st day of October, 1997, by Magadelene W. McDuffie, who is (personally known) to me or who produced as identification.

_____

Print Name Kenya Nelson
Notary Public, State and County: Florida, Duval
Commission No. CC399088
My Commission Expires: June 29, 1998

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

ERNEST McDUFFIE, III,
8803 Yeoman Drive
Jacksonville, Florida 32208,
Appellant, Pro se

CASE NO.: 97-2263
DC DKT NO.: 95-01210 CIV-J-20B

v.

FIRST UNION NATIONAL BANK OF FLORIDA
225 Water St., 1800 First Union Tower
Jacksonville, Florida 32201
Appellee.

AFFIDAVIT OF MARVA M. McDUFFIE McKINNEY

STATE OF FLORIDA
COUNTY OF _____

BEFORE ME, the undersigned authority, this date personally appeared Marvel M. McDuffie McKinney, who, being by me first duly sworn, deposes and says:

1. My name is Marvel M. McKinney. I have personal knowledge of the facts stated herein and I know them to be true.

2. During 1991 through November 1992, I was enrolled as a student at Bethune Cookman College. Prior to 1991, I was a student at Florida Community College at Jacksonville.

3. During 1991, it was necessary for me to obtain a loan to continue my college studies due to the financial condition of my father Ernest McDuffie. (Exhibit #35, Tab 6, Pages 90- 96).

4. Prior to 1991, my father was able to provide for my college education, in the form of paying tuition, and providing room and board.

5. I asked my father, why it was necessary for me to get a loan, and was told First Union discriminated against him on the St. Andrew Church job. First Union, withheld payments, sent negative letters to the bonding company, would not pay the Black subcontractors, and made various unfavorable comments in the newspaper, which I read.

6. The difficulties with First Union greatly impacted my brother Ernest Kevin McDuffie, who was in college during this period, and the well-being of my stepsister Tracia D. Wright, who is physically disabled.

_____

Marvel M. McDuffie McKinney

Sworn to and subscribed before me, this _12th day of October, 1997, by Marva M. McDuffie McKinney, who is personally known to me or who produced _____ as identification.

_____

Print Name Percyell L. Pratt

Notary Public, State and County:
Commission No. CC506378
My Commission Expires: 10/29/99

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

ERNEST McDUFFIE, III,
8803 Yeoman Drive
Jacksonville, Florida 32208,
Appellant, Pro se

CASE NO.: 97-2263
DC DKT NO.: 95-01210 CIV-J-20B

v.
FIRST UNION NATIONAL BANK OF FLORIDA
225 Water St., 1800 First Union Tower
Jacksonville, Florida 32201
Appellee.

_____)

AFFIDAVIT
OF NATHANIEL PHILIP RICHARDSON

STATE OF FLORIDA
COUNTY OF DUVAL

BEFORE ME, the undersigned authority, this date personally appeared Nathaniel Philip Richardson, who, being by me first duly sworn, deposes and says:

1. My name is Nathaniel Philip Richardson. Owner of Charter Electric of Florida , Incorporated, address 5566 Moncrief Road, Jacksonville, Florida, Certified Electrical Contractor by the State of Florida

and Georgia have personal knowledge of the facts stated herein and I know them to be true.

2. During 1990 through 1991, I was the Electrical Subcontractor on the St. Andrew Missionary Baptist Church new construction project which is the subject of this action.

3. Around June, 1990, I submitted a rough estimate to install a 600 amps electrical service based on plans and specifications given to me for bidding. After the contract was signed and the work ready, and safe to cover the walls up, the second or third set of drawings was issued by Lazar, and I was already in the procedure of doing the work without additional costs. A change order should have been issued to do it, but they did not want to agree to no more money. The second or third set called for 800 amps service, with no reason given for the change or additional funds.

4. Sometime in July 1991, M. V. Cummings wrote a letter saying that Mr. McDuffie was in default because he deviated from the plans and specifications and the electrical system installed did not meet the National Electrical Codes and was unsafe. The electrical system I installed was according to the plans and specifications used to bid the project and no National Electrical Codes were violated. This was verified by the independent engineer Mr. Ross who inspected the work. Also the City of Jacksonville Building Codes Inspector visited the job site inspected and approved the work saying it met code requirements. The city had approved the plans before an electrical permit was issued, which were the plans I used to bid the job.

5. The situation with First Union and the St. Andrew job created problems for my company. As a result of the bad name given to Mr. McDuffie and me in Jacksonville, work was hard to come by. As result I had to seek work outside the area, such as Orlando and Miami. It gave us a bad reputation. This was not my first project, so I knew industry standards and performed in a workmanlike manner. I have completed other projects, such as schools, airports, churches, etc., for various contractors so the St. Andrew project was not first. Yet in the letters First Union, Lazar and Cummings were trying to cut Mr. McDuffie and me down. I have never seen a bank and engineer get so involved in this nature.

6. As the only Black State Certified Electrician in Florida during this time, the way we were treated nearly ran me out of business. It was well known in the industry that Mr. McDuffie had been selected to be the contractor for the General Baptist and quite a number of Black churches were planning to build. The entire business of writing all those letters and calling for default would hurt him and all the subcontractors who worked for him, and it did.

_____

Nathaniel Philip Richardson

Sworn to and subscribed before me, this 21st day of October, 1997, by Nathaniel Philip Richardson, who is (personally known) to me or who produced ____ as identification

Print Name Kenya Nelson
Notary Public, State and County: Florida, Duval
Commission No. CC399088
My Commission Expires: June 29, 1998

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

ERNEST McDUFFIE, III,
8803 Yeoman Drive
Jacksonville, Florida 32208,
Appellant, Pro se

CASE NO.: 97-2263
DC DKT NO.: 95-01210 CIV-J-20B

v.

FIRST UNION NATIONAL BANK OF FLORIDA
225 Water St., 1800 First Union Tower
Jacksonville, Florida 32201
Appellee.

AFFIDAVIT OF CHARLES M. WILCOX

STATE OF FLORIDA
COUNTY OF DUVAL

BEFORE ME, the undersigned authority, this date personally appeared Charles M. Wilcox, who, being by me first duly sworn, deposes and says:

1. My name is Charles M. Wilcox. Vice President of Bill's Refrigeration & Air Conditioning (HVAC) Service, formerly of 2619 Palmdale Street, Jacksonville, Florida have personal knowledge of the facts stated herein and I know them to be true.

2. During 1990 through 1991, we were the Heating and Cooling Contractor the St. Andrew Missionary Baptist Church new construction project which is the subject of this action.

3. Around May, 1990, I submitted a proposal to install central heat and air conditioning service based on plans and specifications given to me for bidding. Around May, 1991, due to cost restrains imposed by the owner a change was made to replace the Trane Air Condition unit with an American Standard. In addition to the cost factor, the Trane unit was a discontinued model and there was only one local distributor. This was not acceptable to the church for availability reasons. Submittals to replace the Trane units were forwarded to M. V. Cummings Engineers for approval. Written approval was granted by Cummings and C. E. Bagwell of the City of Jacksonville Department of Public Works. The Owner, St. Andrew had given approval sometime in April, 1991, however First Union would not agree, nor would they honor payment requests.

4. Sometime in July 1991, M. V. Cummings wrote a letter saying that Mr. McDuffie was in default because he deviated from the plans and specifications. Further stating since the Contractor deviated from the original construction documents

for economic reasons as requested by the Owner, they would no longer be involved with the project.

5. It was bad situation with First Union on St. Andrew. The whole problem seem to hang on them not wanting to change the Air Condition unit to something the Church wanted. The Church was the one paying for the equipment, but the bank along with the architect and engineer wanted them to have something else. The project gave Mr. McDuffie and his subcontractors in Jacksonville, a bad name, making work hard to obtain. As result Bill Refrigeration had to close its doors and I found employment elsewhere.

_____

Charles M. Wilcox

Sworn to and subscribed before me, this 21st day of October, 1997, by Charles M. Wilcox, who is (personally) known to me or who produced _____ as identification.

Print Name Kenya Nelson
Notary Public, State and County: Florida, Duval
Commission No. CC399088
My Commission Expires: June 29, 1998

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

ERNEST McDUFFIE, III,
8803 Yeoman Drive
Jacksonville, Florida 32208,
Appellant, Pro se

CASE NO.: 97-2263
DC DKT NO.: 95-01210 CIV-J-20B

v.

FIRST UNION NATIONAL BANK OF FLORIDA
225 Water St., 1800 First Union Tower
Jacksonville, Florida 32201
Appellee.

AFFIDAVIT OF MELANESE D. WAY

STATE OF FLORIDA
COUNTY OF Duval

BEFORE ME, the undersigned authority, this date personally appeared Melanese D. Way, who, being by me first duly sworn, deposes and says:

1. My name is Melanese D. Way. I have personal knowledge of the facts stated herein and I know them to be true.

2. During 1991, I help guarantee a S. B. A loan with Ernest McDuffie and his wife Magadelene W. McDuffie to complete the St. Andrew Church project (Exhibit #35, Tab 8, Pages 120A - 120). The loan was prior approved by the Small Business Administration. The loan was necessary due to the discriminatory manner in which First Union administered the construction contract. First Union, withheld payments, sent negative letters to the bonding company, would not pay the Black subcontractors, made various unfavorable comments in the newspaper, which I read, and the bank required bonding of the project.

3. The St. Andrew job was a source of income for numerous Black African-American small companies, their employees and families. The treatment by First Union unjustly harmed these individuals.

4. During 1991, it was necessary for my daughter Marva McDuffie McKinney to obtain a loan to continue her college studies, due to the financial condition of her father Ernest McDuffie.

5. Prior to 1991, her father was able to provide for her college education, in the form of paying tuition, and providing room and board.

6. The difficulty with First Union greatly impacted my son, Ernest Kevin McDuffie, who later entered college, and the well-being of my step

daughter Tracia D. Wright, who is physically disabled.

_____

Melanese D. Way

Sworn to and subscribed before me, this __17th__ day of October, 1997, by Melanese D. Way, who is (personally known) to me or who produced _____ as identification.

Print Name___Kenneth Peele,Jr.

Notary Public, State and County Florida Duval

Commission No. CC592232

My Commission Expires: 1-24-01

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

ERNEST McDUFFIE, III,
8803 Yeoman Drive
Jacksonville, Florida 32208,
Plaintiff, Pro se

DC DKT NO.: 95-01210 CIV-J-20B

v.
FIRST UNION NATIONAL BANK OF FLORIDA
225 Water St., 1800 First Union Tower
Jacksonville, Florida 32201
Defendant.

"AFFIDAVIT OF ERNEST K. McDUFFIE"

STATE OF Pennsylvania
COUNTY OF Chester

My name is Ernest K. McDuffie, the son of Ernest McDuffie III. I have been personally effected by the way First Union Ban has unfairly treated my father's company. I was shocked to find out that after working three consecutive summers for his company and putting my earnings into savings that it was abruptly pulled from my account to cover a loan made by D & M Contracting Company. (refer to exhibits A & B). This act was unnecessary and

malicious in that this was my individually earned money not my father's. This was actually the beginning of several undo acts by First Union Bank upon my father's company, D & M, that greatly effected me. I began college with the intention of majoring in Construction Management so that I could work for my father's company. However, I changed my major to education because my father's company was on such a downward spiral and I didn't see where I could benefit from working with his company. Furthermore, while in college, I had to take out several student loans because my father was unable to help me pay for college after years of owning a successful company (refer to exhibit C). My student loans at present exceed $15,000 and will continue to grow with another semester of graduate school to complete (refer to exhibit D).

Ernest K. McDuffie

13th of December 1996
Notarial Seal
Debra A. Barry, Notary Public, East Goshen Two, Chester County. My Commission Expires Nov. 15, 1999, Member Pennsylvania Association of Notaries

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
56 Forsyth Street, NW
Atlanta, Georgia 30303

ERNEST McDUFFIE, III,
Individual , and doing Business
as D & M Contracting Company
8803 Yeoman Drive
Jacksonville, Florida 32208
Appellant, Pro se

CASE NO.: 97-2263
DC DKT NO: 95-01210 CIV-J-20B

V.

FIRST UNION NATIONAL BANK OF FLORIDA

225 Water St., 1800 Union Tower
Jacksonville, Florida 32201

Appellee.

AFFIDAVIT OF ERNEST TAYLOR

STATE OF FLORIDA
COUNTY OF DUVAL

BEFORE ME, the undersigned Authority, this date personally appeared Ernest Taylor who, being by me First duly sworn deposed and says:

1. My name Ernest Taylor. I live at 4518 Malissa Court, Jacksonville, Florida, and I have personal knowledge of the facts stated herein; and, I know them to be true.

2. During 1990 - 1992, I was the Tile contractor on the St. Andrew project, which is the subject of this action.

3. First Union National Bank of Florida required a Bid, Payment, and Performance Bond for St. Andrew. When on similar and higher cost projects built by white contractors no such demands were made. For example: three bonds were required for the construction of St. Andrew Missionary Baptist Church at $456,000.00, when no bonds were required on similar and larger projects financed by First Union National Bank of Florida. (See exhibit 35, pp. 9-13, 215-218). According to records filed with the clerk of the courts, First Union National Bank of Florida required No Bonds from White contractors: The John Stokes Company Inc. of 6821 Southpoint Drive North, Jacksonville, Florida 32216 for the construction of First Timothy Baptist Church a $750,000.00 facility located at 12103 Biscayne Boulevard, Jacksonville, Florida (See Exhibit 35, pp. 27-33). Also, on Saint Paul African Methodist Episcopal Church located 6910 New Kings Road, Jacksonville, Florida built by White contractor certified Benchmark Companies Inc. 7901 Baymeadows Way, Jacksonville, Florida 32256 for $2,100,000.00 No Bonds was required, (See Exhibit 35, pp. 22-26,213,214).

4. First Union National Bank of Florida called for default based on faulty and misleading information and disregarding the evidence from governmental approving agencies and other tactics used by First Union National Bank of Florida. For example: First Union took the word of Wayne Kelly of M.V. Cummings. (See exhibit 35, pp. 36A-B) as the basis for their default when the work they cited as code violations were not violations at all (see Ross Disp. P 49). Additionally, the governmental inspection agency who has the final word on such matters had approved the work and supported the outside inspection by Ross,(see Exhibit 35, p. 36A-B) on both the First Timothy Baptist
Church and St . Paul AME. The inspection of the governmental entity, namely, the department of Public work, zoning and inspection Division were accepted (see Exhibit 35 P.36).

5. First Union National Bank of Florida tactics of attacking the Bonding capability of African Americans is not new; however, it is a sure way to impede a minority firm's growth and development by limiting their ability to compete In the open market as a prime contractor. (See Exhibit 35, pp 198-202 D.J. Miller and Associates, Disparity study city of Jacksonville) as a result of the negative impact of withholding payments.

6. The Electrical Contractor, Nathaniel Richardson and Charles Wilcox, the Heating /Air Conditioning Contractor were African-American. The utility and plumbing contractors were white. The workforce was 95% African-Americans living in the local community around the St. Andrew Missionary Baptist Church, with a predominately African-American membership.

7. There were two sets of plans. Only, one set had been approved by First Union National Bank of Florida

and the Borrower. The set dated 4/1/89 was used to price, bid, and bond the project. The set dated 8/28/90, containing numerous changes (amended) that had not been approved y the Borrower nor First Union National Bank of Florida, according to their commitment letter and Loan Agreement be used,(see Exhibit 35, pp. 203-207). The vast difference in the two sets of plans and the demands from First Union National Bank of Florida were unjustified and goes against a standard of architect's care prescribed by Florida Statue 481. 221(5).

8. Further, First Union National Bank of Florida holds that funds were withheld because "the work for which the funds were requested was not done according to the approved plans and specifications" (see Dunn AFF. At. 14; Munger AFF. 15). However, payments to the utility and plumbing contractors were made; and, they were using the same plans as D&M Contracting and the electrical and H.V.A.C. Contractors, (see Exhibit 35, pp. 67A-67-F). First Union National Bank of Florida continue to withhold construction funds, covering payments for African-American contractors even though request were approved by Architect and St. Andrew. For example: Payments for the plumbing and utility work performed by White contractor's Classic Plumbing and water and sewer utility both were paid while payment for electrical and heating/air conditioning contractors, Charter Electric and Bill Refrigeration; both African-American were held (see Richardson Disp. pp 91-94).

9. First Union National Bank of Florida was unjustly enriched by not paying the final progress payment. First Union National Bank of Florida benefited from the completion of the church and not paying the remaining balance of $8,811.40. To be allowed to discriminate, destroy the economic opportunities, and retain funds due is more than unjust enrichment. It bor

ders on piracy. The facility has been in continuous use since November 17, 1991.

10. First Union National Bank of Florida is well known in the African-American community for their unfavorable practices (see Exhibit 35, pp. 153-157, 160, 182-190). The attack was also felt by the Heating/Air Conditioning Contractor, who closed down following the treatment by First Union Bank of Florida on the St. Andrew project and the Electrical Contractor must go out -of-town in order to have work to sustain his family. First Union National Bank of Florida's history in dealing with minority issues speaks to the far reaching effect of the organization corporate business practices. Where there is smoke there is fire. Discrimination cases filed in Winter Garden, Florida, 1990 protest in Orlando, Florida and Charlotte, First Union National Bank of Florida corporate headquarters are indicative of the lack of sensitivity to Blacks and minority communities (see Exhibit 19 page 48).

11. St. Andrew is still standing with no changes made to the electrical system, the air conditioning units or the constructed building. According to the owners of the church, everything is working in a satisfactory condition.

_____

Ernest Taylor

Sworn to and subscribed before me, this __21st___ day of October, 1997 by Ernest Taylor, who is (personally known) to me or who produced _____as identification.

Print name Print Name Kenya Nelson

Notary Public, State and County: Florida, Duval
Commission No. CC399088
My Commission Expires: June 29, 1998

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
56 Forsyth Street, NW
Atlanta, Georgia 30303

ERNEST McDUFFIE, III,
Individual, and doing Business
as D & M Contracting Company
8803 Yeoman Drive
Jacksonville, Florida 32208

Appellant, Pro se

CASE NO.: 97-2263

V. DC DKT NO: 95-01210 CIV-J-20B

FIRST UNION NATIONAL BANK OF FLORIDA
225 Water St., 1800 Union Tower
Appellee.

AFFIDAVIT OF ERNEST McDUFFIE, III

STATE OF FLORIDA
COUNTY OF DUVAL

BEFORE ME, the undersigned Authority, this date personally appeared Ernest McDuffie, III, who, being by me First duly sworn deposed and says:

1. My name is Ernest McDuffie III, I have personal knowledge of the facts stated herein; and, I know them to be true.

2. During 1990 and presently, I am the Owner of D & M Contracting Company, 8803 Yeoman Drive, Jacksonville, Florida and the General Contractor for the St. Andrew Missionary Baptist Church project, which is the subject of this action.

3. First Union National Bank of Florida intentionally discriminated against me by treating me different in the administration of the St. Andrew construction contract, thereby violating my Civil Rights that are protected under Public Law 88-352 Title VI of the Civil Rights Act as amended, (CFR.) 29 Part 31, (CFR) 49 part 21, (CFR) 15 part 8, (CFR) 24 part 570-600, (CFR) 24 Part 1 (CFR) 13 Part 112 and (CFR) 34 Part 100.

3. First Union National Bank of Florida required a Bid, Payment, and Performance Bond for St. Andrew. When on similar and higher cost projects built by white contractors no such demands were made. For example: three bonds were required for the construction of St. Andrew Missionary Baptist Church at $456,000.00, when no bonds were required on similar and larger projects financed by First Union National Bank of Florida. (See exhibit 35, pp. 9-13, 215-218). According to records filed with the clerk of the courts, First Union National Bank of Florida required No Bonds from White contractors: The John Stokes Company Inc. of 6821 Southpoint Drive North, Jacksonville, Florida 32216 for the construction of First Timothy Baptist Church a $750,000.00 facility located at 12103

Biscayne Boulevard, Jacksonville, Florida (See Exhibit 35, pp. 27-33). Also, on Saint Paul African Methodist Episcopal Church located 6910 New Kings Road, Jacksonville, Florida built by White contractor certified Benchmark Companies Inc. 7901 Baymeadows Way, Jacksonville, Florida 32256 for $2,100,000.00 No Bonds was required, (See Exhibit 35, pp. 22-26,213,214).

4. First Union National Bank of Florida called for default based on faulty and misleading information and disregarding the evidence from governmental approving agencies and other tactics used by First Union National Bank of Florida. For example: First Union took the word of Wayne Kelly of M.V. Cummings. (See exhibit 35, pp. 36A-B) as the basis for their default when the work they cited as code violations were not violations at all (see Ross Disp. P 49). Additionally, the governmental inspection agency who has the final word on such matters had approved the work and supported the outside inspection by Ross,(see Exhibit 35, p. 36A-B) on both the First Timothy Baptist Church and St . Paul AME. The inspection of the governmental entity, namely, the department of Public work, zoning and inspection Division were accepted (see Exhibit 35 P.36).

5. First Union National Bank of Florida tactics of attacking the Bonding capability of African American is not new; however, it is a sure way to impede a minority firm's growth and development by limiting their ability to compete In the open market as a prime contractor. (See Exhibit 35, pp 198-202 D.J. Miller and Associates, Disparity study city of Jacksonville) as a result of the negative impact of withholding payments, I (Ernest McDuffie,III.) secured a S.B.A Loan

and received prior approval from the Small Business Administration to complete the St. Andrew project of which First Union National Bank of Florida is Co-owner. This large indebtedness required guarantees from my wife Magadelene W. McDuffie, and former Spouse Melanese D. Way, thereby obligating them. The impact effected our children. Two of whom were in college; and, the other one is physically disabled. As a father, I was unable to financially assist them in their strive for higher education.(see Exhibit 35, pp. 90-96).

6. The Electrical Contractor, Nathaniel Richardson and Charles Wilcox, the Heating /Air Conditioning Contractor were African-American. The utility and plumbing contractors were white. The workforce was 95% African-Americans living in the local community around the St. Andrew Missionary Baptist Church, with a predominately African-American membership.

7. There were two sets of plans. Only, one set had been approved by First Union National Bank of Florida and the Borrower. The set dated 4/1/89 was used to price, bid, and bond the project. The set dated 8/28/90, containing numerous changes (amended) that had not been approved the Borrower nor First Union National Bank of Florida, according to their commitment letter and Loan Agreement be used,(see Exhibit 35, pp. 203-207). The vast difference in the two sets of plans and the demands from First Union National Bank of Florida were unjustified and goes against a standard of architect's care prescribed by Florida Statue 481. 221(5).

8. Further, First Union National Bank of Florida holds that funds were withheld because "the work for which the funds were requested was not done according to the approved plans and specifications"

(see Dunn AFF. At. 14; Munger AFF. 15). However, payments to the utility and plumbing contractors were made; and, they were using the same plans as D&M Contracting and the electrical and H.V.A.C. Contractors, (see Exhibit 35, pp. 67A-67-F). First Union National Bank of Florida continue to withhold construction funds, covering payments for African-American contractors even though request were approved by Architect and St. Andrew. For example: Payments for the plumbing and utility work performed by White contractor's Classic Plumbing and water and sewer utility both were paid while payment for electrical and heating/air conditioning contractors, Charter Electric and Bill Refrigeration; both African-American were held (see Richardson Disp. pp 91-94).

8. Me and my subcontractors submitted changes orders, and amended contracts to comply with the altered plans and specification. Those submitted by the African-American Electrical and HVAC Contractors were held, rejected or not paid; and, those submitted by the white plumbing and utility contractors were paid.

9. First Union National Bank of Florida was unjustly enriched by not paying the final progress payment. First Union National Bank of Florida benefited from the completion of the church and not paying the remaining balance of $8,811.40. To be allowed to discriminate, destroy economic opportunities, and retain funds due is more than unjust enrichment. It borders on piracy. The facility has been in continuous use since November 17, 1991.

10. The Impact of First Union National Bank of Florida actions had far reaching effect on more than but

the Owner, of D&M Contacting Co., First Union Bank's undue tactics and results touched my subcontractors and the African-American community. For example: I had been named the contractor of record for the Florida General Baptist Convention covering 750

churches representing approximately 500,000 people in 1990. (See Exhibit 6 page 21.) The hope of employing and empowering a people through self help was destroyed. D&M Contracting Co. And my subcontractors would have been in a position to create better jobs thus helping to eliminate crime in our community and creating a better Life for many. The African-American contractors working on the St. Andrew project represented collectively approximately 50 individuals for whom they provided jobs. See a list of the projects completed. The Owner of D&M Contracting Company and my Subcontractor's (see Exhibit 6 Pages 1-43).

11. First Union National Bank of Florida is well known in the African-American community for their unfavorable practices (see Exhibit 35, pp. 153-157, 160, 182-190). The attack was also felt by the Heating/Air Conditioning Contractor, who closed down following the treatment by First Union Bank of Florida on the St. Andrew project and the Electrical Contractor must go out -of-town in order to have work to sustain his family. First Union National Bank of Florida's history in dealing with minority issues speaks to the far reaching effect of the organization corporate business practices. Where there is smoke there is fire. Discrimination cases filed in Winter Garden, Florida, 1990 protest in Orlando, Florida and Charlotte, First Union National Bank of Florida corporate headquarters are indicative of the lack of sensitivity to Blacks and minority communities (see Exhibit 19 page 48).

Supreme Court, U.S.
FILED
APR 16 1998
CLERK

DOCKET NUMBER: 97-1533

IN THE SUPREME
COURT OF THE UNITED STATES
OCTOBER TERM, 1997

ERNEST MCDUFFIE, III, d/b/a
D & M CONTRACTING COMPANY,

Petitioner,

vs.

FIRST UNION NATIONAL BANK OF FLORIDA,

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
for the Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN F. MACLENNAN, Counsel
of Record for Respondent,
SMITH HULSEY & BUSEY, 1800
First Union Bank Tower, 225
Water Street, Jacksonville,
FL 32202 (904) 359-7700

20 pp

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JOHN F. MACLENNAN, Counsel of Record for Respondent, SMITH HULSEY & BUSEY, 1800 First Union Bank Tower, 225 Water Street, Jacksonville, FL 32202 (904) 359-7700

COUNTERSTATEMENT OF QUESTION PRESENTED

Petitioner alleges that First Union violated Title VI of the Civil Rights Act of 1964 by discriminating against him in connection with a construction loan.

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d provides in part:

> no person . . . shall . . . on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Based on undisputed facts, the District Court granted First Union summary judgment because, inter alia, McDuffie failed to present a prima facie of unlawful discrimination. In no way did the decision of the Eleventh Circuit conflict with the decisions of other courts of appeals or any decisions of this Court. There is no reason for further review of this matter and the petition for writ of certiorari should be denied.

CERTIFICATE OF INTERESTED PARTIES

Counsel for First Union National Bank of Florida certifies that the following persons and entities may have an interest in the outcome of this case:

D & M Contracting Company

First Union National Bank (successor by merger to First Union National Bank of Jacksonville) has no parent companies and the following non-wholly owned subsidiaries:

1560 Wilson Blvd.L.P.
2-4 Potter Place Urban Renewal
Andalusia Senior Housing, L.P.
Arbor Glenn L.P.
Arbor Village, L.P.
Ashton of Richmond Hill, L.P.
Athens Rental Housing, L.P.
Bacon Housing, L.P.
Barrett Place L.P.
Barrett Place II L.P.
Beaumont Avenue Apts., L.P.
Beechridge L.P.
Bowler Housing L.P.
BR L.P.
Business Development Corp. of SC
Camellia Court Apts. L.P.
Cannon/Hearthwood L.P.
Cantebury of Hilliard, Ltd.
Cedar Forest L.P.
Chambers Bridge Urban Renewal Housing, L.P.
City Affordable Housing LLC
Cranford Avenue Apts., L.P.
Creative Choice Homes IX, Ltd.
CTI Ltd. Partnership

Danville Community Development Corp.
Ellenton Housing Associates, Ltd.
Elm Lake Apartments, Ltd.
Equitable Realty Associates, L.P.
Evergreen Apts., L.P.
Fairbrooke Apts., L.P.
Fairfax County Redevelopment Housing Authority/HCDC One L.P.
Fairfax County Redevelopment Housing Authority/HCDC Two L.P.
Actuator and Valve Services, Inc.
Case Holdings, Inc.
Communications Systems Technologies, Inc.
Fresh Creek Technologies, Inc.
Integra Services Technologies, Inc.
Larex, Inc.
Lion Laboratories, Inc.
MaxFlight Technologies, Inc.
National Resource Directories, Inc.
Polycel Acquisition, Inc.
Allentown Development Co., Inc.
American Information Co., Inc.
Arcon HealthCare, Inc.
Atlantic Spinners, Inc.
Beacon Industrial Group LLC
Chattem, Inc.
Cybergenics Holding, Inc.
Electronic Mfg. Systems, Inc.
Envoy Corp.
Frontier Vision Partners, L.P.
FVP GP, L.P.
Genesis Direct, Inc.

Grapevine Broadcasting of Anchorage, LLC
Grapevine Broadcasting of Austin, LLC
Grapevine Broadcasting of Joplin, LLC
Grapevine Broadcasting of Wyoming, LLC
Heartland Pork Enterprises, Inc.
HTI Communications, Inc.
Meigher Communications, L.P.
Renal Disease Management by Physicians, Inc.
Right Source, Inc.
Texoil, Inc.
Universal Compression Holdings, Inc.
U.S. Salt Holdings, Inc.
First Union Commercial Leasing Group, L.L.C.
First Union/Maher Partners
Ironbrand Capital LLC
Integrion Financial Network, L.L.C.
National Auto Finance Co., L.P.
First Wells Fargo Leasing Partnership
Ironbrand Capital LLC
Integrion Financial Network, L.L.C.
National Auto Finance Co.
Multiplex Leasing Partners
First Union Commercial Leasing Group, L.L.C.
Besso Holdings Ltd.
First Union HKCB Asia, Ltd.
Wheat Int'l., Ltd.
Chronicle Securities Investment

Trust Co., Ltd.
NOVA Corp.
Flagship Partners, L.P.
Floral Oaks Apts., Ltd.
Fountain Place Associates L.P.
Fox Haven L.P.
General Homes Corp.
C4 Media Cable South, L.P.
Glen Royall Mill L.P.
Gold Rush I Apts. L.P.
Gold Rush II Apts. L.P.
Golfview Associates L.P.
Green Gables Apts., L.P.
Green Ridge Associates, LLC
Greenleaf Village of Groveland, Ltd.
Hamilton Manor L.P.
Haverhill Affordable Housing, Ltd.
Homes for Fredericksburg L.P.
Housing Equity Fund of Virginia II, L.P.
Indian Run L.P.
International Progress, Inc.
Jacksonville Affordable Housing, Ltd.
Lafayette Family L.P.
Lantana Associates, Ltd.
Laurel Pointe of Salisbury L.P.
Lieber & Co.
Manor Ridge L.P.
Martin's Landing L.P.
Martin's Landing II, L.P.
Maryland Housing Equity Fund III L.P.
Montgomery Homes L.P.
NNI Bell Street L.P.
Oak Crest Apts. of Kannapolis, Ltd.

Oldbridge Urban Renewal, L.P.
One South Place, L.P.
Orianna Street, L.P.
Peppermill Partners, L.P.
Ravenwood of Kissimmee, Ltd.
Reservoir Hill L.P.
Richmond Community Dev. Corp.
River Reach of Orange County, Ltd.
Roanoke Community Dev. Corp.
Rome Rental Housing, L.P.
Rosemont Manor, Ltd.
Sable Point II Apts. L.P.
Salem Run Associates, L.P.
Salem Run II Associates, L.P.
Sandlewood Terrace of Ludowici L.P.
Savings Associations Financial Enterprises, Inc.
Senior Cottages of Shippensburg, Ltd.
S.H.E. Urban Renewal Associates, L.P.
Shenandoah Valley Properties, L.P.
Craigmont II, L.P.
Elkmont Partners, L.P.
Grottoes Partners L.P.
Willow Lake Partners, L.P.
Southwoods L.P.
Spinnaker Reach Apts. of Duval, Ltd.
Spring Gate Manor Ltd.
St. Joseph's Affordable Housing L.P.
Statesboro Rental Housing L.P.
Steeplechase Apts., Ltd.
Stonecreek Apts. of Mooresville, Ltd.

Sugar Mill Apts., L.P.
The Atlanta Business Community Dev. Corp.
The Exchange Building L.P.
Timberleaf Estates L.P.
Tobacco Row Phase II Associates, L.P.
Ashland Joint Venture
Silver Spring Station Joint Venture
TWC Eighty-Eight, Ltd.
TWC Ninety-Eight, Ltd.
TWC Ninety-Five, Ltd.
TWC Ninety-Four, Ltd.
TWC Ninety-One, Ltd.
TWC Ninety-Six, Ltd.
VCP-Alderman Park Partners, Ltd.
Vestcor-WR Associates, Ltd.
Villa Biscayne of South Dade, Ltd.
Washington Apts. Associates, L.P.
Waterford Manor, L.P.
West Brickell Apts., Ltd.
Westville, Ltd.
Wheat Benefit Services, LLC
William Byrd Hotel Associates, L.P.
Lone Stone, L.C.
Woodlawn Joint Venture
Yorktown Arms Dev. L.P.

Michael R. Freed
John F. MacLennan
E. Lanny Russell
Honorable Harvey E. Schlesinger
Smith Hulsey & Busey
Honorable John E. Steele

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CITES TO THE UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA AND THE UNITED STATES COURT OF APPEALS ELEVENTH CIRCUIT

Both the District Court and the Court of Appeals' decisions are unpublished.

COUNTERSTATEMENT OF THE CASE AND THE FACTS

The District Court entered summary judgment in favor of First Union on February 4, 1997, a copy of that order is contained in Petitioner's Appendix pages 12-23. None of the affidavits contained in Petitioner's Appendix (page 84-135) were filed with the District Court.

The facts underlying McDuffie's claim and First Union's defenses are adequately set forth in the District Court's opinion found at Petitioner's Appendix pages 12-23. Petitioner was the general contractor on a church construction project funded by a loan First Union made to the owner of the property. Petitioner claimed that First Union discriminated against him during the construction of this church. The District Court granted First Union's Motion for Summary Judgment because it found on undisputed facts that, among other things, plaintiff failed to present a prima facie case of unlawful discrimination.

On September 19, 1997, the Court of Appeals for the Eleventh Circuit affirmed. The court held that the District Court properly concluded that McDuffie had not made out a prima facie case of discrimination.

None of the affidavits contained in the Appendix to the "Corrected" Petition were filed by McDuffie with the District Court. Those affidavits were not filed with the Eleventh Circuit until McDuffie's Petition for Rehearing.

ARGUMENT

I. THE COURT OF APPEAL'S DECISION DOES NOT CONFLICT WITH THIS COURT'S OPINION IN CELOTEX OR RULE 56 FRCP.

A. PETITIONER'S CLAIM THAT THE COURT OF APPEAL'S OPINION DOES NOT INDICATE IT CONSIDERED AFFIDAVITS FILED BY PETITIONER IS WITHOUT MERIT.

Rule 56, FRCP, permits the filing of affidavits in support and in opposition to motions for summary judgment. However, McDuffie did not file affidavits in opposition to First Union's Motion for Summary Judgment until he filed his Petition for Rehearing with the Court of Appeals. As such, the materials were untimely and could not properly be considered by the Court of Appeals. Crawford v. Lamantia, 34 F.3d 28 (1st Cir. 1994).

The materials submitted by McDuffie to the District Court consisted of unauthenticated documents, none of which are of the type properly considered under Rule 56. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

B. FIRST UNION'S MOTION FOR SUMMARY JUDGMENT WAS NOT PREMATURELY FILED.

McDuffie cites Celotex Corp. v. Catrett, 477 U.S. 317 (1986), for the proposition that motions for summary judgment are premature when filed less than one year after the commencement of the action. Celotex, of course, does not so hold. In Celotex, this Court concluded that a party opposing summary judgment could not complain that the motion was premature where it was filed 12 months after the complaint was filed. While First Union filed its motion less than a year after suit was filed, discovery had been completed and the motion was in no way premature.

II. THE COURT OF APPEALS DID NOT HOLD THAT TITLE VI WAS INAPPLICABLE TO FIRST UNION'S LOAN.

In the second "Reason Why Petition Should Be Granted" McDuffie argues that Title VI should apply to the loan made by First Union for the church construction on which McDuffie was the general contractor. The District Court held Title VI inapplicable because First Union recieved no federal financial assistance in connection with the loan (see Petitioner's Appendix at page 19). However, the Court of Appeals affirmed the District Court's decision because McDuffie failed to present a prima facie case of race discrimination, even assuming federal financial assistance was involved and

McDuffie had standing to sue pursuant to Title VI. Thus, the Court of Appeals decision in no way deals with the applicability of Title VI or the standing of McDuffie to bring suit pursuant to Title VI.

III. THE COURT OF APPEALS DECISION DOES NOT CONFLICT WITH THE MINNESOTA COURT OF APPEAL'S DECISION IN TWIN CITY.

While any conflict between the Eleventh Circuit's decision and one by the Minnesota Court of Appeals would not justify granting the Writ, the Court of Appeal's decision in no way conflicts with Twin City Const. v. ITT Indus. Credit Co., 358 N.W. 2d 716 (Minn. App. 1984). In Twin City, the Minnesota state appellate court determined that under Minnesota state law, a contractor was a third party beneficiary of a construction loan agreement even where the agreement itself provided that no other party was entitled to rely on the agreement.

The District Court did hold that McDuffie had no standing to bring suit pursuant to Title VI because he was not First Union's borrower. But the Court of Appeals assumed without deciding that McDuffie had standing and yet affirmed the District Court's decision because McDuffie did not present a prima facie case of discrimination. Accordingly, the issue raised in Twin Cities (standing) was not decided by the Court of Appeals and does not present a reason for granting the Petition.

IV. PETITIONER'S ATTEMPT TO RELY ON EVIDENCE OF DISPARATE TREATMENT OR IMPACT NOT PRESENTED TO THE DISTRICT COURT CANNOT SUPPORT GRANTING THE PETITION.

In his fourth reason for granting the Writ, McDuffie refers to ways in which he was purportedly treated differently than white contractors by First Union. However, McDuffie presented no such evidence to the District Court. None of McDuffie's affidavits were submitted by him until his Petition for Rehearing was filed with the Court of Appeals. See Petitioner's Appendix, page 77-135. Review by the Court of Appeals is limited to the record before the District Court at the time of the District Court's ruling, Crawford v. Lamantia, 34 F.3d 28 (1st Cir. 1994). Affidavits not submitted by petitioner until after the Court of Appeals has ruled cannot be considered by this Court in determining whether to grant the petition.

The Eleventh Circuit's sole holding, that petitioner failed to make out a prima facie case of race discrimination is consistent with this Court's decision in McDonald v. Santa Fe Trail Trans. Co., 427 U.S. 273 (1976). There, this Court held that in order to present a prima facie case a plaintiff must present (i) direct evidence of intentional discrimination; (ii) evidence that plaintiff was treated differently than individuals outside of his protected category; or (iii) evidence of disparate impact. Plaintiff presented nothing except his subjective beliefs

which are insufficient to establish a prima facie case. Elliott v. Group Medical & Surgical Service, 714 F.2d 556, 564 (5th Cir. 1983), cert den'd, 467 U.S. 1215 (1984).

The Eleventh Circuit applied these properly-stated principles in affirming the District Court's summary judgment. As Rule 10 states:

> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

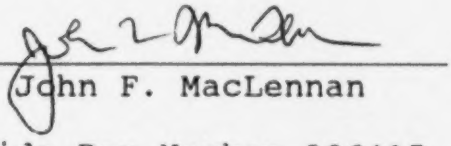
As to petitioner's claims regarding the requirement of performance and payment bonds as being discrimination, those requirements were contained in the commitment letter issued to the borrower by First Union before First Union was aware of the identity of the general contractor. Therefore, this requirement cannot be evidence of unlawful discrimination on the part of First Union.

CONCLUSION

Because the decision of the Court of Appeals in no way conflicts with the decisions of this Court or other courts of appeals, the petition

for writ of certiorari should be denied.

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